(1) Supreme Court, U.S.
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IN THE

United States Supreme Court

OCTOBER TERM, 2003

TED HERRING,

Petitioner,

v.

JAMES V. CROSBY, JR., Secretary, Department of Corrections, State of Florida, BRADLEY D. CARTER, Warden, Union Correctional Institution, CHARLES CRIST, Attorney General, State of Florida,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

1. Where the factual findings necessary for a criminal defendant to be eligible for the penalty of death under state law are made by the trial judge rather than by the jury, and the jury provides only a non-unanimous "advisory" recommendation of death and makes no factual findings, does the defendant's death sentence satisfy the Sixth and Fourteenth Amendments of the United States Constitution as construed in *Ring v. Arizona*, 536 U.S. 584 (2002)?

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STATEMENT OF THE BASIS FOR JURISDICTION

This petition (the "petition") seeks a writ of certorari with respect to the Supreme Court of Florida's December 10, 2003 order denying the petition of Ted Herring ("Herring" or "petitioner") pursuant to Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100 for a writ of habeas corpus vacating his death sentence. The order is reported at *Herring v. Crosby*, 862 So. 2d 727 (Fla. 2003) and appears in the appendix to this petition.

The Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1257(a) because it concerns a final judgment or decree rendered by the highest court of the State of Florida, draws into question the validity of a Florida statute on the ground of it being repugnant to the United States Constitution, and claims a right, privilege, and immunity under the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the Sixth and Fourteenth Amendments to the United States Constitution, as well as §§ 775.082 and 921.141, Florida Statutes. The pertinent text of these authorities appears in the appendix to this petition.

STATEMENT OF THE CASE

On February 25, 1982, a jury convicted Herring of armed robbery and murder in the first degree in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida (the "trial court"). The penalty phase of

Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. The jury returned an advisory recommendation of death by an eight-to-four vote. The trial judge found four aggravating and two mitigating facts and sentenced Herring to death. Appendix ("App.") 12a-16a; *see also Herring v. State*, 446 So. 2d 1049, 1053 (Fla. 1984) ("*Herring I*").

The aggravating facts the trial judge found explicitly were: (1) Herring previously had been convicted of an unrelated robbery with a firearm; (2) the murder was committed while Herring was engaged in the commission of a robbery; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The mitigating facts that the trial judge found were that: (1) Herring had a difficult childhood and had learning disabilities; and (2) Herring was nineteen years old at the time of the crime. App. 12a-16a; *see also Herring I*, 446 So. 2d at 1053.

Herring appealed the judgment and sentence to the Supreme Court of Florida, which affirmed on February 2, 1984. *Herring I*, 446 So. 2d 1049. In the course of subsequent, post-conviction proceedings pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, the trial judge explained the true—and entirely improper—reason he found Herring eligible for the death penalty:

> The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch" [the trial judge's words, not Herring's]; robbed and shot the clerk.

> Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well.

State v. Herring, No. 81-1957-CC, slip. op. at 5-6 (Fla. Cir. Ct. July 24, 1985); *see also* App. 83a. The trial judge's written findings with respect to sentencing did not disclose that he relied on a "perjury aggravator" in finding Herring eligible for death. App. 11a-17a. Additional challenges to the constitutionality of Herring's death sentence (not relevant to this petition) are pending presently in the United States Court of Appeals for the Eleventh Circuit and the trial court.

On June 23, 2003, Herring filed a petition for a writ of habeas corpus pursuant to Rules 9.030(a)(3) and 9.100 of the Florida Rules of Appellate Procedure in the Supreme Court of Florida claiming that, in light of this Court's decision in *Ring*, his death sentence is in violation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution and under the Constitution and laws of the State of Florida. App. 43a. After briefing by Herring and the State of Florida, but without oral argument, the court denied Herring's petition on December 10, 2003. 862 So. 2d 727; *see also* App. 10a. The court did not provide an explanation for its decision. *Id.*

This Court has not yet addressed whether the Florida death eligibility statute is constitutional in light of Ring. The Supreme Court of Florida first addressed the constitutionality of Florida's death eligibility statute in the wake of *Ring* in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.) (*per curiam*), *cert. denied*, 537 U.S. 1070 (2002). There, the court held that it is for this Court to instruct Florida that its death eligibility statute violates *Ring* and that, in

the absence of such an instruction, the court would not vacate Bottoson's sentence. *See generally Bottoson*, 833 So. 2d 693.

Notwithstanding the court's *per curiam* ruling in *Bottoson*, the concurring opinions of individual justices expressed grave doubt that Florida law can be reconciled with this Court's decision in *Ring*. Chief Justice Anstead expressed "concerns that Florida's scheme may not comply with the Sixth Amendement as now construed in *Ring*" because the trial judge alone determines the existence of aggravating factors and thus makes the findings necessary for the death penalty to be imposed. *Id.* at 704-05. Similarly, Justice Pariente wrote that "*Ring* does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme" because, among other things, "[t]he jury does not *find[ ]* specific aggravating factors. Thus, it is the jury that recommends a sentence and the judge who *finds* the specific aggravating factors." *Id.* at 719. In addition, Justice Shaw concluded that *Ring* "has a direct impact on Florida's capital sentencing statute" because Florida law requires a unanimous jury finding for any element of a criminal offense, and "[n]owhere in Florida [death eligibility] law is there a requirement that the finding of an aggravating circumstance must be unanimous." *Id.* at 717.

To date, neither this Court nor any federal court has (to petitioner's knowledge) issued a decision addressing explicitly the question of whether Florida's death eligibility statute survived *Ring*. The Supreme Court of Florida has thus far adhered to its *per curiam* decision in *Bottoson*—but not without dissent. *See, e.g., Butler v. State*, 842 So. 2d 817, 835 (Fla. 2003) (Pariente, J., dissenting in pertinent part); *see also id.* at 835 (Anstead, C.J., dissenting

in pertinent part); *id.* at 834 (Shaw, J., dissenting in pertinent part).

ARGUMENT

This petition presents gravely important questions of federal constitutional law arising out of this Court's decision in *Ring*. This Court has yet to decide these questions, and the Supreme Court of Florida has decided them in a way that conflicts with this Court's decision in *Ring*. Sup. Ct. R. 10(c). In addition, the Supreme Court of Florida has decided these questions in a way that conflicts with the decisions of other state courts of last resort. Sup. Ct. R. 10(b). The Court should grant this petition in order to resolve these conflicts.

I.

THE FLORIDA DEATH ELIGIBILITY STATUTE, AND THUS HERRING'S DEATH SENTENCE, CANNOT BE RECONCILED WITH THIS COURT'S DECISION IN *RING*

A. The Florida Death Eligibility Statute and Thus Herring's Death Sentence, Violates the Sixth Amendment Because the Trial Judge, and Not the Jury, Makes the Factual Findings Necessary for Death Eligibility

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that "the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Id.* at 597. Specifically, the

Court held that Arizona's death sentencing statute was unconstitutional because it assigned the fact finding necessary to put the defendant to death to the judge and not the jury. *Id.* at 609.

Florida's death sentencing statute—under which Herring was sentenced—suffers from precisely the same constitutional flaw. Like the Arizona statute addressed in *Ring*, Florida's statute provides specifically that the judge, and not the jury, makes the factual findings necessary to put a defendant to death. Fla. Stat. § 921.141. Moreover, this Court has held that under Florida law, the trial judge alone makes the findings of fact necessary to impose death. *See, e.g., Hildwin v. Florida*, 490 U.S. 638, 639 (1989).

In *Walton v. Arizona*, this Court held that for Sixth Amendment purposes the Florida statute is *indistinguishable* from the very statute this Court later struck down in Ring:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. *A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.*

497 U.S. 639, 648 (1990) (emphasis added).

This conclusion is consistent with the Supreme Court of Florida's own decision in *Mills v. Moore*, 786 So. 2d 532

(Fla. 2001). In *Mills*, the court noted that, in *Walton*, this Court "addressed a capital sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury. Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Id.* at 536-37 (citation and footnote omitted). But in *Ring*, the Court *did* hold that the Sixth Amendment right (of jury findings for facts increasing the maximum punishment) recognized in *Apprendi v. N.J.*, 530 U.S. 466 (2000), extends to capital cases and *did* overrule *Walton*. Thus, as the Supreme Court of Florida conceded in *Mills*, if *Walton* is unconstitutional, so too is the Florida death eligibility statute.

The Florida courts have held repeatedly that a Florida jury's participation in the death eligibility determination is only advisory and that the trial judge alone makes the findings of fact necessary to impose death. *See, e.g., Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986) (The jury does not "bear[ ] the same degree of responsibility as that borne by a 'true sentencing jury.'"); *Odom v. State*, 403 So. 2d 936, 942 (Fla. 1981) (jury's role restricted to announcing "the judgment of the community as to whether the death penalty is appropriate"); *Johnson v. State*, 393 So. 2d 1069, 1074 (Fla. 1980) ("The function of the jury in the sentencing phase [*i.e.*, recommending] . . . is not the same as the function of the jury in the guilt phase [*i.e.*, fact finding]"); *accord Van Royal v. State*, 497 So. 2d 625, 628 (Fla. 1986); *Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983); *Davis v. State*, 703 So. 2d 1055, 1061 (Fla. 1997); *Grossman v. State*, 525 So. 2d 833, 840 (Fla. 1988); *Morton v. State*, 789 So. 2d 324, 333 (Fla. 2001). Or, as Justice Shaw

put it in *Combs v. State*, "the jury's recommendation is merely advisory [and] *not supported by findings of fact*." 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., concurring) (emphasis added).

In the proceedings below, respondents' principal argument was that "[i]n Florida, the determination of "death eligibility" is made at the guilt phase of a capital trial, not at the penalty phase, as is the Arizona practice." That position is contrary to the plain language of Florida law and finds no support in cases. Florida law provides that:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five years before becoming eligible for parole *unless the proceedings held to determine sentence according to the procedure set forth in section 921.141 result in findings by the court that such a person shall be punished by death.*

Bottoson v. Moore, 833 So. 2d at 713 (quoting Fla. Stat. § 775.082(1) as it existed in 1979) (emphasis added). A capital felony conviction therefore does not constitute a finding that the defendant may be sentenced to death. Rather, the conviction allows for further proceedings where the trial court makes further factual "findings" as to the defendant's eligibility for death. Fla. Stat. § 921.141(2)(a) (setting procedure for "*Findings* in support of sentence of death") (emphasis added).

Justice Lewis explained in his *Bottoson* opinion that, "it is unmistakable that a death penalty cannot be imposed in Florida without a prior factual finding with regard to aggravating factors." 833 So. 2d at 725. Similarly, Justice

Pariente noted that "*the maximum penalty after a finding of guilt in Florida is life imprisonment. The death penalty for first-degree murder cannot be imposed unless and until additional factual findings are made as to the existence of aggravators that outweigh the mitigators—just as in Arizona.*" *Id.* at 722 (emphasis added). Nor can the State's position be reconciled with *Hildwin* where this Court found that under the Florida death eligibility statute, the trial judge makes the factual findings necessary for death eligibility, 490 U.S. at 639, or *Walton*, where this Court stated that "a Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." 497 U.S. at 648.

In addition, the state argued below that this Court's decision in *Ring* rested on a finding that the Court had misinterpreted Arizona law in deciding *Walton*. That also is incorrect. Nowhere in *Ring* did the Court suggest that it previously misinterpreted either Arizona or Florida law. On the contrary, the Court's descriptions of the Arizona scheme in *Walton* and *Ring* are substantively identical. What changed was not this Court's understanding of Arizona law but rather its interpretation of the Sixth Amendment. In *Walton* and *Hildwin*, the Court held that the Arizona and Florida death eligibility statutes, respectively, did not violate the Sixth Amendment because "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640-41. But in *Ring*, the Court explicitly overruled *Walton* and clearly abrogated *Hildwin* when it held that the "Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravat-

ing factor determination be entrusted to the jury." 536 U.S. at 597.

In addition to the clear conflict between Florida law and *Ring*, there is a split among states. As explained in detail in Point I.C., *infra*, the highest courts of Missouri, Colorado, and Nevada have struck down death sentences under *Ring* on the grounds presented here.

B. Even If the Presence of an Advisory Jury Were Sufficient to Comply with the Sixth Amendment, the Absence of Unanimity in the Jury's Recommendation and the Trial Judge's Reliance on an Uncharged Aggravator, Make Clear That Herring's Death Sentence is Unconstitutional

It is clear that some of the Justices of the Supreme Court of Florida believe that the Florida death eligibility statute survives *Ring* only because of the presence of the advisory jury. *See*, *e.g.*, *Bottoson*, 833 So. 2d at 701 (Quince, J. concurring) ("The basic premise of *Ring* has been fulfilled under the Florida statute. That is, the trial judge does not make the sentencing decision alone."). Indeed, that is the only conceivable basis to distinguish between the Arizona and Florida death eligibility statutes. For all of the reasons discussed previously, and, as this Court stated explicitly in *Walton*, that is a distinction without a difference.

Moreover, even assuming, *arguendo*, that it is jury participation that saves the Florida scheme, then such participation must conform to the requirements of the Florida Constitution and the United States Constitution as interpreted in *Ring* and *Apprendi*. As Justice Pariente recently explained, "*Ring*, considered in tandem with the jury-trial guarantee [requiring unanimity] in article I, section 22 of

the Florida Constitution" requires the reversal of a death sentence where the jury's recommendation is not unanimous. *Butler*, 842 So. 2d at 836.

Prior to *Apprendi* and *Ring*, the absence of unanimity did not appear to be a problem because the Court had not recognized a "Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Hildwin*, 490 U.S. at 640 (citations omitted). When this Court overruled that principle in *Apprendi*, and later *Ring*, jury unanimity became a *sine qua non* for death eligibility. *See Bottoson*, 833 So. 2d at 710 (Anstead, C.J., concurring) ("However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote . . . . This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in *Apprendi* and *Ring*.").

A full third of Herring's jury voted against death. The recommendation of so deeply divided a panel simply cannot serve as the basis for death eligibility in light of *Ring*. As Justice Scalia explained, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610. Thus, under *Ring*, the predicates for death must be found by the jury, and, under Florida law, the jury must be unanimous. Fla. Const. art. I, § 22; *accord Jones v. State*, 92 So. 2d 261 (Fla. 1956); *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (key principal of American criminal justice system is that defendant's

guilt will be "determined beyond a reasonable doubt by the *unanimous vote of 12 of his fellow citizens*") (emphasis added). Because Herring's panel was divided eight to four, his death sentence violated his right under the Florida and United States constitutions to unanimous jury findings beyond a reasonable doubt on all facts necessary to sentence him to death.

Even further assuming, *arguendo*, that unanimity is not required, death eligibility obviously cannot be based on facts the jury was not instructed to consider. Here, the trial judge has admitted that the basis of *his* decision to impose death was not the recommendation of the jury but rather *his* conclusion that Herring committed perjury. App. 83a. None of the trial court's instructions to the jury advised them that perjury was an appropriate consideration in determining either guilt or the appropriate sentence because it obviously was an improper consideration. App. 23a-26a. Nor would it have been an appropriate consideration if charged since it does not appear in the death eligibility statute.

Thus, even if in its formulation the Florida scheme provides for the judge and jury to decide death eligibility *together*, there is conclusive factual evidence that here, the trial judge decided the issue *alone*. The jury was not told that perjury was a relevant consideration, and assuming, as one must, that the jury adhered faithfully to the court's instructions, there was no jury consideration of Herring's alleged perjury. Accordingly, Herring was deprived of his right under the Sixth and Fourteenth Amendments of the United States Constitution to have the jury determine all of the factual predicates to his death sentence.

C. Herring's Robbery Conviction Alone Did Not Make Him Death-Eligible Under Florida Law and Thus Does Not Validate His Sentence Under *Ring*

As noted previously, among the aggravators found in this case was Herring's contemporaneous robbery conviction. In its post-*Bottoson* opinions, the Supreme Court of Florida has suggested that the presence of such a conviction may preclude relief under *Ring*. *See*, *e.g.*, *Banks v. State*, 842 So. 2d 788, 793 (Fla. 2003). In substance, the Supreme Court of Florida's rationale for rejecting *Ring* claims by petitioners with contemporaneous felony convictions appears to be that, because a jury has found the commission of such a felony unanimously and beyond a reasonable doubt during the guilt phase, the jury has also, by definition, found an aggravator sufficient for death eligibility. This misapprehends the Florida statute and this Court's decision in *Ring*.

Applying this exception ignores *Ring*'s requirement that the jury make every factual finding necessary to impose death. *Ring*, 536 U.S. at 597. Unlike states where the finding of a single aggravator renders a defendant death-eligible, the Florida statute makes clear that a series of independent factual findings are necessary to impose death. Specifically, the Florida statute requires a factual finding of (a) "sufficient aggravating circumstances;" and (b) "insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141. In other words, the fact-finder's role does not end when it determines that an aggravator exists. It must also make a factual determination as to whether the aggravators are "sufficient." If the aggravators are sufficient, the fact-finder then must make

factual findings as to any applicable mitigating circumstances. Once that is done, the fact-finder must make a determination as to whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances.

Accordingly, the fact that the jury has made the predicate factual finding for a violent felony aggravator does not strip the defendant of his right to have the jury determine whether the aggravator is "sufficient," nor does it deprive the defendant of his right to have the jury determine (i) whether mitigating circumstances are present; and (ii) if so, whether those circumstances are sufficient to outweigh the aggravators. Here, there is no dispute that the trial court, and not the jury, made the factual finding that Herring's aggravators were "sufficient" and made all of the factual findings with respect to mitigating circumstances. As such, Herring's conviction violates *Ring* regardless of whether the jury found a contemporaneous violent felony. Nothing in *Ring* is to the contrary.

This interpretation is consistent with Nevada's interpretation of its own, similar death penalty statute. As the Supreme Court of Nevada has explained:

> Nevada statutory law requires two distinct findings to render a defendant death—eligible: "The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3). This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is

> in part a factual determination, not merely discretionary weighing.

Johnson v. State, 59 P.3d 450, 460 (Nev. 2002); *cf. Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—[they] must be found by the jury beyond a reasonable doubt").

Similarly, on remand after the Court's decision in *Ring*, the Supreme Court of Arizona clarified that "Arizona's statutes require *more than* the presence of one or more statutorily defined aggravating factors . . . [and] the *trier of fact* must determine whether mitigating circumstances call for leniency." *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003) (emphasis added). A system whereby the jury determines the aggravator (*i.e.*, a prior felony), and the judge makes factual findings as to the sufficiency of aggravating or mitigating circumstances, cannot satisfy *Ring*.

The Supreme Court of Missouri also is in accord with the highest courts of Nevada and Arizona—and in conflict with the Supreme Court of Florida—on this question. *See State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (*en banc*). Missouri determines death eligibility in four steps. Step 1 requires "the trier of fact to find the presence of one or more statutory aggravating factors." 107 S.W.3d at 258-59. Step 2 requires the trier of fact to "find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating factors, warrants imposition of the death penalty." *Id.* at 259. Step 3 requires a determination of "whether the evidence in mitigation outweighs the evidence in aggravation." *Id.* Step 4 requires the trier of fact to "declare the punishment at life imprisonment if it decides under all of the circumstances

not to assess and declare the punishment of death." *Id.* at 261.

Like Herring, Whitfield, had a related felony conviction, and the Missouri court held that it did not violate the Sixth and Fourteenth Amendments as construed in *Ring* for the trial judge to find a related-conviction aggravator because such a finding necessarily rested on an earlier jury determination. *Id.* at 263. However, the Missouri court held that it *did* violate *Ring* for the trial judge to determine whether the aggravator was "sufficient" (Step 2). *Id.* Missouri's Step 2 is substantively identical to the requirement under the Florida statute that a related-felony aggravator not only be found to have occurred but also be found "sufficient." Similarly, in *Woldt v. People*, 64 P.3d 256 (Colo. 2003) (*en banc*), the Supreme Court of Colorado declared Woldt's death sentence unconstitutional under Colorado's own four-step death eligibility statute notwithstanding the presence of a contemporaneous felony aggravator because the trial judge, rather than the jury, made the factual finding as to the "sufficiency" of the aggravator. *See generally* 64 P.3d 256. In addition, in *State v. Fetterly*, 52 P.3d 874 (Idaho 2002), the Supreme Court of Idaho reversed a death sentence under *Ring* notwithstanding the jury-determined presence of a contemporaneous felony aggravator.

Accordingly, consistent with *Ring* and the post-*Ring* decisions of the Nevada, Arizona, Missouri, Colorado, and Idaho supreme courts, the mere fact of Herring's prior and contemporaneous felony convictions did not permit the trial judge to make the additional factual findings necessary to impose death. In addition, while the courts of certain jurisdictions (post-*Ring*) have permitted the judge to decide whether to impose death after considering facts

found by the jury, *see Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002), *cert. denied*, 124 S. Ct. 430 (2003), and *Oken v. State*, 835 A.2d 1105, 1152 (Md. 2003), that is not how the Florida statute is designed or functions. In Florida, as discussed previously, the trial judge, and not the jury, makes the threshold determinations for death eligibility. *See also Smith v. State*, No. SC01-2103, 2004 WL 178582, at *14-15 (Fla. Jan. 29, 2004) (clearly distinguishing decision to impose death from fact finding necessary to determine death eligibility). In any event, to the extent the decisions of additional states are in conflict with *Ring* and the decisions of the highest courts of Nevada, Arizona, Missouri, Colorado, and Idaho, that is all the more reason to grant this petition.

D. The Court Need Not Address Retroactivity in Considering the Petition

The Court need not address retroactivity in considering this petition. Herring's petition for a writ of habeas corpus to the Supreme Court of Florida was governed by the test for determining retroactivity under Florida law, which is set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). A change in law, according to *Witt*, applies retroactively in post-conviction capital proceedings when "the change: (a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id.* at 931.

Ring easily satisfies each of these requirements. *First*, it was decided by this Court. *Second*, it is constitutional in nature. *Third*, there can be no question that it constitutes a development of fundamental significance. The right to trial

by jury in a capital proceeding is perhaps the most sacrosanct right in our system of justice. As Justice Shaw explained in his concurring opinion in *Bottoson*, *Ring* "is of 'fundamental significance,' for its purpose is to safeguard the basic protections guaranteed by the right to trial by jury." 833 So. 2d at 717. As Justice Shaw also pointed out, prior to *Ring*, the Supreme Court of Florida repeatedly has applied significant capital sentencing decisions retroactively. *Id.* at 717 n.50 (citing cases). In addition, in all of the reported cases raising *Ring* claims, the Supreme Court of Florida addressed the claim on its merits. There is no reason to believe that Supreme Court of Florida deviated from that approach in Herring's case.

Accordingly, it is respectfully submitted that the appropriate procedure under these circumstances is to grant certiorari on the question of whether Herring's death sentence violated *Ring*, and, if the decision below is reversed, remand to the Supreme Court of Florida for a determination of whether *Ring* is retroactive under *Witt*. Petitioner is aware that this Court granted a writ of certorari in *Schriro v. Summerlin*, 124 S. Ct. 833 (2003), apparently to resolve a circuit split on the question of whether *Ring* applies retroactively in federal collateral proceedings. In *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2002), the Ninth Circuit held that *Ring* should be applied retroactively in federal collateral proceedings. The *Witt* standard clearly is more generous to defendants than the federal standard set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Indeed, the Witt test is closely akin to the former federal test set forth in *Stovall v. Denno*, 388 U.S. 293 (1967), which was drastically narrowed in *Teague*.

Of course, if *Ring* is held to apply retroactively in *Summerlin*, that will be binding on the Supreme Court of Florida because, as is axiomatic, state courts cannot provide *less* constitutional protection than the federal constitution does. *Cal. v. Ramos*, 463 U.S. 992, 993 (1983) (*en banc*) ("States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."); *Johnson v. State*, 384 U.S. 719, 733 (1966) (States may "apply [new constitutional] standards in a broader range of cases than is required" by the federal courts.). On the other hand, even if the Ninth Circuit is reversed in *Summerlin*, remand for determination under *Witt* still will be necessary. *See, e.g., Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 297-98 (1987) (deciding federal constitutional question raised by appellants and remanding to Pennsylvania Supreme Court to consider retroactivity under state law).

CONCLUSION

For all of foregoing reasons, petitioner respectfully requests that the Court grant certiorari review.

Dated: March 8, 2004

Respectfully submitted,

/s/ _____

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APPENDIX A

The U.S. Constitution

Amendment V—Trial and Punishment, Compensation for Takings.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person *be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be *deprived* of life, liberty, or property, without *due process* of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

The U.S. Constitution

Amendment VI—Right to speedy trial, confrontation of witnesses.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX C

The U.S. Constitution

Amendment VIII—Cruel and Unusual punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX D

The U.S. Constitution

Amendment XIV—Citizenship rights.

1. All persons born or naturalized in the United States, and subject to the *jurisdiction* thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *deprive* any person of life, liberty, or property, without *due process* of law; nor deny to any person within its *jurisdiction* the equal protection of the laws.

2. Representatives shall be *apportioned* among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or

hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

28 U.S.C. § 1257 states in relevant part:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

APPENDIX F

Section 775.082 of the Florida Statutes states in relevant part:

(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

APPENDIX G

Section 921.141 of the Florida Statutes states in relevant part:

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make

the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

APPENDIX H

SUPREME COURT OF FLORIDA
WEDNESDAY, DECEMBER 10, 2003

NO. SC03-1144

TED HERRING,

Petitioner(s)

vs.

JAMES V. CROSBY, JR., ETC., ET AL.,

Respondent(s)

The petition for writ of habeas corpus is hereby denied.

WELLS, PARIENTE, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

ANSTEAD, C.J., would deny without prejudice to file in the trial court.

A True Copy
Test:

/s/ THOMAS D. HALL
Thomas D. Hall
Clerk, Supreme Court

[Round Stamp]
SUPREME COURT OF THE
STATE OF FLORIDA

APPENDIX I

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 81-1957-CC

Filed in open Court March 1, 1982

STATE OF FLORIDA,

—VS.—

TED HERRING,

Defendant.

FINDINGS PURSUANT TO F. S. 921.141

I. On February 25, 1982 at Daytona Beach, Florida, the jury returned a verdict of guilty as to Murder in the First Degree and Robbery With a Firearm. On February 26, 1982 the jury returned an advisory opinion recommending imposition of the death penalty. The Defendant was sentenced to death by electrocution by this Court on March 1, 1982, and their findings are filed concurrent with sentencing. While these findings concern the application of the death penalty the Court does note with regard to the robbery sentence that there was abundant evidence to support

a finding of premeditated murder. It is not a situation where there was only evidence to support felony murder (see *Mahaun vs. State*, 377 So. 2nd 1158 (Fla. 1979) and *Hillery vs. State*, 391 So. 2nd 777 (4th DCA 1980).

II. *Aggravating circumstances* (must be established beyond a reasonable doubt)

1. *The crime for which the defendant is to be sentenced was committed while he was under sentence of imprisonment.* The evidence does not establish this circumstance.

2. *The Defendant has been previously convicted of another capital offense or of a felony involving the use of threat of violence to some person.* As conceded by the defense the Defendant was convicted and sentenced by this Court in January of 1982 for an unrelated robbery with a firearm. This factor is established.

3. *The Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.* There is no evidence to support this circumstance.

4. *The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.* As conceded by the defense the murder was committed by the Defendant during the course of a robbery. This circumstance is established.

5. *The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.* The Court accepts Detective Varner's testimony wherein the Defendant said he fired the second shot into Norman Dale Hoeltzel because he was still alive and the Defendant did

not want a witness to his crime. By his own admission the Defendant clearly established this circumstance. The case of *Riley vs. State*, 366 So. 2nd 19 (Fla. 1979) supports the proposition that this circumstance applies to the elimination of witnesses to a crime as well as law enforcement officers.

6. *The crime for which the Defendant is to be sentenced was committed for financial gain.* While the facts of the case fit this circumstance it cannot be counted because this Court already has counted as an aggravating circumstance the fact that the crime was committed during the felony of robbery.

7. *The crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.* The evidence does not establish this circumstance.

8. *The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.* This circumstance comes close to being established. The Defendant gave no indication of any remorse during the trial. In fact, probation officer Mary White testified Defendant stated the death of Norman Dale Hoeltzel meant "one less cracker." Lack of remorse can be considered in determining this criteria (*Sireci vs. State*, 399 So. 2nd 964 (Fla. 1981). Still this Court believes however brutal and senseless this crime is, it does not meet this extreme criteria.

9. *The crime for which this Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.* Norman Dale Hoeltzel was shot in the side of the head at close range. The bullet first passed through his

hand. While he lay on the floor wounded, but still alive, the Defendant shot him again in he neck to eliminate any possible witness. The victim was killed because he may have been a possible witness to the robbery. There is no evidence Norman Dale Hoeltzel and the Defendant knew one another or had any contact prior to the shooting. There is only some slight evidence Norman Dale Hoeltzel was making a move towards the armed Defendant. There certainly was no affray. This Court finds beyond a reasonable doubt that this murder was cold, calculated, and premeditated; and without any pretense of moral or legal justification. This circumstance is established.

III. Mitigating circumstances (do not have to be established beyond a reasonable doubt)

1. *Defendant has no prior significant history of prior criminal activity.* Pursuant to *Maggard vs. State*, 399 So. 2nd 973 (Fla. 1981) the defense conceded this mitigating circumstance did not exist; and the court prohibited the State from playing the full confession tape which would have disclosed the Defendant's participation in several convenience store robberies. This mitigating circumstance does not exist (with the exception of the one convenience story [sic] robbery for which the Defendant was previously tried and convicted, this Court did not take into consideration the three convenience store robberies now pending before this Court.)

2. *The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.* The evidence does not establish this circumstance.

3. *The victim was a participant in the Defendant's conduct or consented to the act.* The evidence does not establish this circumstance.

4. *The Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor.* The evidence does not establish this circumstance.

5. *The Defendant acted under extreme duress or under the substantial domination of another person.* The evidence does not establish this circumstance.

6. *The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.* There was no evidence indicating Defendant was intoxicated or was operating with reduced capacity to appreciate the criminality of his conduct on May 29, 1981. In fact, the evidence strongly indicates the murder was coldly calculated to eliminate a witness. The Defendant's mother did indicate the Defendant had learning disability, was hyperactive, and had a low IQ of 80. But this Court had ample opportunity to closely observe the Defendant. He is alert, responsive, and reasonably articulate. At worst, he is of slightly below average intelligence. This mitigating factor is not established by the evidence.

7. *The age of the Defendant at the time of the crime.* The State and the defense indicate the Defendant was 19 at the age [sic] of the crime. Although the Florida Supreme Court has said there is no per se rule pinpointing a particular age as an automatic mitigation factor (*Perry vs. State*, 395 So. 2nd 170 (Fla. 1981), nineteen seems to be right at the pivot

point. The Defendant in *Perry* was 20, and yet that age was not counted as a mitigating circumstance under the facts of that case. In this case age does not seem to be a factor. After observing the Defendant closely over a period of time the Court believes the Defendant would continue the same course of criminal conduct at age 20, and beyond. Nonetheless, the Court feels the Defendant should be given the benefit of the doubt as to this mitigating factor. This mitigating factor is established but it is not a strong mitigating factor.

8. *Any other aspect of the Defendant's character of record and any other circumstance of the of the offense.* The Court accepts as a mitigating circumstance the fact that as Defendant had a difficult childhood (see *Neary vs. State*, 384 So.2nd 881 (Fla. 1980). His mother indicated the Defendant was raised essentially without a father, was hyperactive, had learning disabilities, and had trouble in school.

SUMMARY

The Court finds that four (4) aggravating circumstances exist; only two (2) mitigating factors have been established. This Court is aware however that the Court should go beyond mere mechanical tabulation (*Brown vs. State*, 381 So.2nd 690 (Fla. 1980). In this case, not only do the established aggravating factors numerically outweight [sic] the mitigating factors, but the aggravating factors are stronger and carry more weight and relevancy than the mitigating factors. The Defendant's age and difficult childhood are not sufficient mitigating factors to block imposition of the death penalty in a case where a Defen-

dant, now with a prior violent felony conviction, murders an innocent clerk during a robbery so that the clerk will not testify against him. Further, this Court must also give due weight to the jury's recommendation of death. After having carefully reviewed all evidence in this case and carefully reviewing the evidence in mitigation and aggravation, the Court finds imposition of the death penalty is warranted.

/s/ S. JAMES FOXMAN
S. JAMES FOXMAN CIRCUIT JUDGE
March 1, 1982

COPIES TO: Gayle Graziano, Assistant State Attorney
J. Peyton Quarles, Assistant Public Defender

APPENDIX J

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA,
IN THE YEAR OF OUR LORD
ONE THOUSAND NINE HUNDRED AND EIGHTY-ONE

Florida Statute No. 782.04 & 812.13
Filed in open Court June 20, 1981

STATE OF FLORIDA,

—VS.—

TED HERRING

INDICTMENT

THE SPRING TERM GRAND JURY in and for Volusia County, Florida, empaneled and sworn to inquire and true presentment make, hereby, in the name of and by the authority of the State of Florida, bring this prosecution and make the following charge or charges in two (2) count(s):

COUNT I

CHARGE: FIRST DEGREE MURDER, in Violation of F.S. 782.04

SPECIFICATIONS OF CHARGE: In that TED HERRING, on or about the 29th day of May, 1981, at or near Daytona Beach within Volusia County, Florida, then and there unlawfully, while engaged in the perpetration of or attempt to perpetrate a robbery, or from a premeditated design to effect the death of one Norman Dale Hoeltzel, a human being, did kill and murder Norman Dale Hoeltzel by shooting him with a gun.

COUNT II

CHARGE: ROBBERY, in Violation of F.S. 812.13(1) & (2)(a)

SPECIFICATIONS OF CHARGE: In that TED HERRING, on or about the 29th day of May, 1981, at or near Daytona Beach within Volusia County, Florida, did unlawfully by force, violence, assault or putting in fear, take certain property, to-wit: U.S. currency, of a value more than One ($1.00) Dollar, the property of the Southland Corporation or Norman Dale Hoeltzel as owner or custodian, from the person or custody of Norman Dale Hoeltzel, and in the course of committing said robbery, carried a firearm, to-wit: a revolver.

A TRUE BILL

/s/ [Illegible]
Foreman of the Grand Jury

I, the undersigned State Attorney or Assistant State Attorney, as authorized and required by law, have advised the Grand Jury returning this indictment.

/s/ [Illegible]
Assistant State Attorney
Seventh Judicial Circuit of Florida

This indictment presented by the aforesaid Grand Jury in open court this 20th day of June, 1981, and on the 30th day of June, 1981, at the hour of 6:30PM was filed by me.

/s/ [Illegible]
Deputy Clerk of the Circuit Court

APPENDIX K

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR VOLUSIA COUNTY

CASE NO. 81-1957, DIVISION CC

Filed August 2, 1982

STATE OF FLORIDA,

—VS.—

TED HERRING,

Defendant.

Volusia County Courthouse
DeLand, Florida
February 26, 1982
8:30 A.M.

TRANSCRIPT OF PROCEEDINGS

The above-styled cause came on to be heard before the Honorable S. James Foxman, Circuit Judge, and a duly impaneled jury at the time and place above indicated.

PRESENT: GAYLE GRAZIANO, Esquire
Assistant State Attorney
on behalf of the State of Florida

PEYTON QUARRLES, Esquire
Assistant Public Defender
for defendant

HOWARD B. PEARL, Esquire
Assistant Public Defender
for Defendant

TRACY L. ROMANO
Deputy Official Court Reporter
Seventh Judicial Circuit of Florida

Others as may appear in the transcript.

WHEREUPON the following proceedings were had:

* * *

[60] it's just so bad, the electric chair is what is called for. Is this that kind of a case? Certainly not.

Ted's mother indicated that he had problems one time and he was sent to St. Luke's Hospital to be evaluated for psychological problems and learning disabilities. While he was there, Ted was checked by a lot of people and tested by a lot of people. And, as far as learning was concerned, he was asked to write something. And this is one of the things he wrote. This is, as you will be able to hear, this is not grammatically perfect language.

MS. GRAZIANO: Your Honor, I'm going to object. This is not in evidence.

THE COURT: Objection is sustained.

MR. QUARRLES: Ted Herring is a human being. Dale Hoeltzel was a human being. Killing Ted Herring isn't going to bring Mr. Hoeltzel back. It's not going to do anybody any good. Don't vote for Ted Herring's life.

THE COURT: Thank you, counsel.

Ladies and gentlemen of the jury:

It's now your duty to advise the Court as to what punishment should be imposed upon the Defendant for this crime of first degree murder.

As you've been told, the final decision as to what punishment shall be imposed, is the responsibility of **[61]** the Judge. However, it's your duty to follow the law that will now be given you be [sic] the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstance exist to justify the imposition of the death penalty. And whether sufficient mitigating circumstance exist, outweigh the aggravating circumstance found to exist.

Your advisory sentence should be based upon the evidence that you've heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstance that you may consider are limited to any of the following that are established by the evidence.

The crime for which the Defendant is to be sentenced was committed while he was under the sentence of imprisonment.

The Defendant has been previously convicted of another capital offense or of a felony involving the use of threat or violence to some person.

The crime of robbery with a firearm is a felony involving the use of violence to another person.

The Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.

[62]The crime for which the Defendant is to be sentenced, was committed while he was engaged in the commission of the crime of robbery.

The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing the lawful arrest or effecting excape from custody.

The crime for which the Defendant is to be sentenced was committed for financial gain.

The crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful execution of any governmental function or enforcement of laws.

You're instructed that if you find beyond a reasonable doubt that the capital crime was committed for pecuniary gain. [sic] And also, beyond a reasonable doubt that the capital crime was committed while the Defendant was engaged in the commission of a robbery, the law in the State of Florida is such that you may consider these as only one aggravating circumstance.

The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

The crime for which the Defendant is to be sentenced was committed in a cold, calculated, premeditated manner, without any pretense of moral or legal justifi-**[63]**cation.

If you find the aggravating circumstance do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole for twenty-five years.

Should you find sufficient aggravating circumstance do exist, it will then be your duty to determine whether the mitigating circumstance exist, that outweigh the aggravating circumstance.

Among the mitigating circumstance you may consider if established by the evidence, are:

The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

The victim was a participant in the Defendant's conduct or consented to the act.

The Defendant was an accomplice in the offense for which he is to be sentenced. But, the offense was committed by another person and the Defendant's participation was relatively minor.

The Defendant acted under extreme duress or under the substantial domination of another person.

The capacity of the Defendant to appreciate the criminality of the conduct or conform his conduct to the requirements of law, was substantially impaired.

[64]The age of the Defendant at the time of the crime.

Any other aspect of the Defendant's character or record in any other circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If one or more aggravating circumstance are established, you should consider all the evidence tending to establish one or more mitigating circumstance.

And give the evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

Mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you're reasonably convinced that mitigating circumstance exist, you may consider it as evidence.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circum-

stance against the mitigating circumstance, and your advisory sentence must be based on these considerations.

In these proceedings, it's not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.

[65] The fact that the determination of whether the majority of you recommend the sentence of death or the sentence of life imprisonment in this case, can be reached by you by a single ballot. It should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake. Bring to bear your best judgement in reaching your advisory sentence.

If a majority of the jury determine that the Defendant should be sentenced to death, your advisory sentence will be:

The majority of the jury by vote . . . whatever the vote is.

Advise and recommend to the Court that it impose the death penalty upon the Defendant.

On the other hand, if by six or more votes, the jury determines that the Defendant should not be sentenced to death, your advisory sentence will be:

The jury advises and recommends to the Court that it impose the sentence of life imprisonment upon the Defendant without the possibility of parole for twenty-five years.

You'll now retire to consider your recommendation. **[66]** When seven or more of you are in agreement as to what the sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

I'll send back both recommendations. Return the appropriate recommendation.

Counsel, any corrections or additions to the instructions as read?

MS. GRAZIANO: No, Your Honor.

MR. QUARRLES: Yes, sir.

THE COURT: Yes, sir.

Should they be made outside the jury?

MR. QUARRLES: Yes.

THE COURT: We need to have you go out for a second, please.

THE BAILIFF: The jury is out of hearing.

THE COURT: Thank you.

Mr. Quarrles.

MR. QUARRLES: I apologize, Your Honor. But, this morning we discussed that I indicated I would object to Aggravated Circumstance number 9. And we didn't cover that when we reconvened downstairs just before coming up. And I wanted to renew that or object to that particular instruction.

THE COURT: All right. For the record, what's **[67]** happened is that number 9, the aggravated circumstance which is the crime for which the Defendant is to be sentenced, was committed in cold, calculated, premeditated manner without any pretense of moral or legal justification. Counsel is objecting to that being read to the jury.

I guess you have Constitutional problems with it?

MR. QUARRLES: Yes, sir.

THE COURT: In essence, that's your objection? All right. That objection is noted for the record.

Bring the jury back in.

Counsel, take a look at the pencils and paper, if you would like.

MS. GRAZIANO: No.

MR. QUARRLES: No.

THE COURT: Okay. Ben, put the one item admitted into evidence, over there, as well.

Ben, also, these two items.

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: Thank you.

Ladies and gentlemen of the jury:

I'll have the bailiff hand Mrs. Flannagan at this time, the following items.

Pencils and paper to help you with your deliberations, if you need it. Two possible verdict forms. **[68]** The one piece of evidence that was admitted during these proceedings. And the instructions in writing that I just read to you.

You may now retire to reach your verdict or an advisory opinion to the Court. Just as soon as you have, knock on the door and we'll bring you out here and we will receive your advisory opinion.

You may now go back and have full and free discussion of this matter.

THE BAILIFF: The jury is out of hearing.

[Recess.]

THE COURT: Let's bring back the jury.

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: Miss Flannagan, have you reached an advisory opinion?

JUROR #3: Yes, we have.

THE COURT: Would you please hand it to the bailiff who will hand it to me.

All right. Mr. Herring, please stand. Counsel.

Publish the verdict.

THE CLERK: Advisory opinion. Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida. Case No. 81-1957-CC.

State of Florida versus Ted Herring, Defendant.

The majority of the jury by a vote of eight, advise **[69]** and recommend to the Court that it impose the death penalty upon Ted Herring.

So say the majority of us, dated this 26th day of February, 1982, at Daytona Beach, Volusia County, Florida. Lorraine Flannagan, Foreperson.

THE COURT: Is there anything else to come before the Court, at this time?

MS. GRAZIANO: Nothing from the State, Your Honor.

THE COURT: Defense.

MR. QUARRLES: No, sir.

THE COURT: I'm going to postpone the sentencing in this case until twelve o'clock Monday, to consider the recommendation of the jury. I'll impose sentence at twelve o'clock in this courthouse Monday.

Mr. Quarrles, I intend to discharge the jury now. They do not have to be present when the sentence is imposed.

Do you object to that procedure?

MR. QUARRLES: I would like the jury polled, as far as the majority.

THE COURT: You have the right to have the jury polled. As to that procedure, do you have any objections?

MR. QUARRLES: I don't understand.

THE COURT: I'm not going to have the jury present **[70]** unless they want to be. I'm discharging the jury now and sentence the Defendant without the jury being present on Monday.

MR. QUARRLES: No. I have no objection to that.

THE COURT: State.

MS. GRAZIANO: No objection.

THE COURT: Mr. Clerk, come over here, please.

THE CLERK: Do you, Miss Vve Carter, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #1: Yes.

THE CLERK: Do you, Miss Thelma Crawford, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #2: Yes, I do.

THE CLERK: Do you, Miss Lorraine Flannagan, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #3: Yes.

THE CLERK: Do you, Mr. Nelson Burnham, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the [71] clerk?

JUROR #4: Yes.

THE CLERK: Do you, Miss Helen Wickham, agree and confirm that a majority of the jury joined in the advisory sentence you have just heard read by the clerk?

JUROR #5: Yes.

THE CLERK: Do you, Alice Reede, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #6: Yes.

THE CLERK: Do you, Miss Rilla Painter, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #7: Yes.

THE CLERK: Do you, Miss Elvira Newcombe, agree and confirm that a majority of the jury joined in the advisory sentence you have just heard read by the clerk?

JUROR #8: Yes.

THE CLERK: Do you, Mr. Robert Russ, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #9: Yes.

THE CLERK: Do you, Miss Felicia Wroniak, agree [72] and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #10: Yes.

THE CLERK: Do you, Miss May Johnson, agree and confirm that a majority of the jury joined in the advisory sentence you have just heard read by the clerk?

JUROR #11: Yes.

THE CLERK: Do you, Miss Helen Conrad, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #12: Yes.

THE CLERK: All affirmative, Your Honor.

THE COURT: Thank you.

Ladies and gentlemen of the jury:

I wish to thank you for your time and consideration of the case. I also wish to advise you of some very special privileges enjoyed by jurors. No juror can ever be required to talk about the discussions that occurred in the jury room, except by Court Order.

For many centuries, our society has relied upon juries [sic] considerations of difficult cases. We've recognized for hundreds of years that a jury's deliberations, discussions and votes, should remain their private affair [73] as long as they wish it.

Therefore, the law gives you the unique privilege not to speak about the jury's work. Although, you're at liberty to

speak with anyone about your deliberations, you're also at liberty to refuse to speak to anyone.

The request may come from those who are simply curious or those who might seek to find fault with you. It will be up to you to decide whether to preserve your privacy as a juror.

I would like the rest of the court to stay where they are. Mr. Vayo, escort the jury out that door. You may leave. Thank you, again.

[Jury excused]

THE COURT: Is there anything else to come before the Court, at this time?

MS GRAZIANO: Nothing from the State, Your Honor.

MR. QUARRLES: I have some matters that I brought to the Court's attention earlier. The proffer.

THE COURT: Okay. We'll go down in chambers with the court reporter.

Do you wish the Defendant to be present at the proffer?

MR. QUARRLES: No, sir.

THE COURT: All right. You waive his presence at the proffer?

* * *

APPENDIX L

580 So.2d 135

SUPREME COURT OF FLORIDA

Ted HERRING,

Appellant,

—v.—

STATE of Florida,

Appellee.

No. 75209.
May 2, 1991.
Rehearings Denied June 12, 1991.

Motion was filed for postconviction relief. The Circuit Court, Volusia County, S. James Foxman, J., denied motion. Movant appealed. The Supreme Court held that: (1) Supreme Court decision in *Rogers* restricting applicability of cold, calculated, and premeditated aggravating factor in death penalty cases did not entitle movant to new sentencing hearing, and (2) due process principles required evidentiary hearing on movant's claim that his public defender's service as special deputy in adjacent jurisdiction resulted in ineffective assistance of counsel.

Remanded.

Barkett and Kogan, JJ., dissented as to Part I.

McDonald, J., dissented as to Part II and filed a concurring and dissenting opinion.

Barkett, J., filed a concurring and dissenting opinion in which Kogan, J., concurred.

[*136] Jon. M. Wilson of Foley & Lardner, Van Den Berg, Gay, Burke, Wilson & Arkin, Orlando, and Jeremy G. Epstein, Dennis P. Orr, David Sorokoff and Alan S. Goudiss of Shearman & Sterling, New York City, for appellant.

Robert A. Butterworth, Atty. Gen. and Barbara C. Davis, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Ted Herring appeals the trial court's denial of his motion for postconviction relief under rule 3.850, Florida Rules of Criminal Procedure. The motion sets forth two claims: (1) that our decision in *Rogers v. State*, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), receding from the application of the cold, calculated, and premeditated aggravating factor, as we applied it in Herring's direct appeal,[1] requires a vacation of Herring's death sentence; and (2) that Herring's trial counsel's appointment as a special deputy sheriff resulted in ineffective assistance of counsel in Herring's trial proceeding.[2] For the reasons expressed, we affirm the

[1] *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

[2] We have jurisdiction. Art. V, § 3(b)(1) Fla.Const.

denial of relief on the first claim and remand to the trial court for an evidentiary hearing on the second claim.

This case has an extensive history before this Court. In 1981, Herring was charged with the murder of a convenience store clerk. We affirmed Herring's conviction for first-degree murder and his sentence of death in *Herring v. State*, 446 So.2d 1049 (Fla. 1984) [*Herring I*]. The facts are detailed in that opinion. In affirming that sentence, we held that the trial judge properly found four aggravating circumstances: (1) that Herring had previously been convicted of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) that the [***137**] murder was committed in a cold, calculated, and premeditated manner. In doing so, we expressly discussed the application of this last aggravating factor in that opinion. We also agreed with the trial judge that the following mitigating factors were present: (1) that Herring was nineteen years old at the time of the crime; (2) that he had a low intelligence quotient and learning disabilities; and (3) that he had had a difficult childhood.

In 1985, Herring filed a motion to vacate judgment and sentence under rule 3.850. The trial court denied the motion and we affirmed. *Herring v. State*, 501 So.2d 1279 (Fla. 1986) [*Herring II*]. Subsequently, in 1987, Herring filed a petition for writ of habeas corpus, claiming that his appellate counsel rendered ineffective assistance. This Court denied relief in *Herring v. Dugger*, 528 So.2d 1176 (Fla. 1988) [*Herring III*].

In 1988, Herring filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. In his petition, Herring asserted that this

Court's decision in *Rogers* required vacation of Herring's death sentence. Herring claimed that, since *Rogers* expressly overrules the application of the cold, calculated, and premeditated aggravating circumstance in our decision in *Herring I*, he is entitled to a new sentencing hearing. The state moved to dismiss Herring's petition because this issue had not been heard by a state court. Herring consented to the state's motion and filed the present motion under rule 3.850, asserting that our decision in *Rogers* was a change in the law. The trial court denied the motion on this ground, holding:

> [T]his matter is procedurally defaulted in that it is untimely presented in violation of the filing deadline set forth in Florida Rule of Criminal Procedure 3.850 and constitutes an abuse of the writ. As noted by the Florida Supreme Court in *Eutzy v. State*, [541 So.2d 1143 (Fla. 1989)], its decision in *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), restricting the applicability of the cold, calculated, and premeditated aggravating factor was *not* a fundamental change in the law which "should be given retroactive effect" but was a mere "evolutionary refinement" in the law which should not be utilized to abridge the finality of judgments.

After so holding, the trial court allowed Herring to amend his 3.850 motion to assert an additional claim regarding his trial counsel's undisclosed conflict of interest. In that claim, Herring asserted that Howard Pearl, an assistant public defender of Volusia County and chief of the capital division, who had been appointed as his trial counsel, was also serving as a special deputy sheriff in Marion County while he represented Herring. Herring contends that,

although Pearl had held this position for more than fifteen years, he had never disclosed this fact to Herring. Herring claims that Pearl's undisclosed conflict of interest presumptively denied him effective assistance of counsel and entitles him to a new trial. In considering this part of the motion, the trial court denied relief without an evidentiary hearing, stating:

> 1. The Defendant's motion relies entirely upon the same factual assertions and legal argument presented to and rejected by this court after evidentiary hearing in *State of Florida vs. Roy Allen Harich*, Case Number 81-1894-BB; in fact, the Harich case as well as the appendices submitted in support of the Harich motion are incorporated by reference in this Defendant's motion. . . . [T]he Defendant's motion merely restates the factual allegations of Harich's motion (most of which have already been rejected by this court in its order denying relief in Harich's case) and no new factual allegations or legal argument are presented in support of the special deputy sheriff/actual conflict of interest issue first raised by Harich and now regurgitated by every capital defendant who was represented by Assistant Public Defender Howard Pearl. Accordingly, for the same reasons outlined in this court's order denying relief in Harich and for the reasons outlined in the State's Rule 3.850 response, the instant motion is denied. . . .
>
> [***138**] 2. The various substantive allegations of conflict of interest raised in the Harich petition and now duplicated by the defendant were rejected in Harich. This court's factual and legal conclusions in Harich necessarily control in this case especially given the

lack of any additional factual allegations in support of his claim by the defendant. The issues presented having already been fully and fairly litigated in the Harich proceeding, and this court having already determined as a matter of fact and law that Howard Pearl was not a regular deputy sheriff but was in fact a "special" or "honorary" deputy sheriff in Marion County for the *sole* purpose of permitting him to carry a firearm and that that status did not create a conflict of interest in his position as an assistant public defender in Volusia County, the instant motion is summarily denied.

PART I

Invalid Aggravating Factor

[1] With regard to Herring's first claim, we find that our *Rogers* decision does not mandate relief under the circumstances of this case. There were four aggravating factors found applicable to this murder: (1) prior conviction of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) the aggravating circumstance in issue, that this murder was committed in a cold, calculated, and premeditated manner. As noted by this Court in *Eutzy v. State*, 541 So.2d 1143, 1147 (Fla. 1989), our decision in *Rogers*, restricting the applicability of the cold, calculated, and premeditated aggravating factor, was not a fundamental change in the law that should be given retroactive effect but was "a mere evolutionary refinement in the law," which should not be utilized to abridge the finality of our judgments. Although we have held in *Eutzy* that *Rogers* is not retroac-

tive, we have chosen to address this issue on the merits because we expressly receded from our approval of the cold, calculated, and premeditated aggravating factor in *Herring I* in our *Rogers* decision.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. *See Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

PART II

Ineffective Assistance of Counsel

[2] With regard to Herring's public defender's service as a special deputy, we hold that due process principles require an evidentiary hearing. In *Harich v. State*, 542 So.2d 980 (Fla. 1989), we found that this same public defender's service as a special deputy was sufficient to require an evidentiary hearing on the issue of whether his relationship to law enforcement officials affected his ability to provide effective legal assistance. After the evidentiary hearing in *Harich*, the trial judge made detailed findings of fact and denied relief. We affirmed the trial judge, holding that the fact that this public defender was a special deputy [***139**] in an adjacent jurisdiction, particularly given the circumstances of the duties and status of such deputy sheriff, did not result in a *per se* conflict of interest. *Harich v. State*, 573 So.2d 303 (Fla. 1990).

The trial judge in this case concluded that it was not necessary to duplicate the evidentiary hearing regarding this issue because he had previously made factual findings on this identical issue in *Harich*. We find that due process principles do not allow the trial judge to adopt factual findings made in a prior case involving a different defendant, even though it concerns the same issue. Herring must be afforded an opportunity to present evidence and examine and cross-examine witnesses on this issue. Although we recognize that the evidence presented may be duplicative, due process requires that Herring be afforded an opportunity for a hearing on this matter. If other defendants raise this same claim, however, we find that it would be proper

for the chief judge to consolidate the cases for one hearing on this single issue.

Accordingly, we remand this cause to the trial judge to have an evidentiary hearing to determine whether Herring's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance. We deny relief on all other grounds.

It is so ordered.

SHAW, C.J., and OVERTON, GRIMES and MCDONALD, JJ., concur as to Part I.

BARKETT and KOGAN, JJ., dissent as to Part I.

SHAW, C.J., and OVERTON, BARKETT, GRIMES and KOGAN, JJ., concur as to Part II.

MCDONALD, J., dissents as to Part II.

MCDONALD, J., concurs in part and dissents in part with an opinion.

BARKETT, J., concurs in part and dissents in part with an opinion, in which KOGAN, J., concurs.

MCDONALD, Justice, concurring in part, dissenting in part.

I would approve the trial judge's order denying relief in full. I have never felt that the alleged claim of a conflict of interest by the assistant public defender, simply because he was an honorary deputy sheriff in an adjoining county, had adequate merit to require an evidentiary hearing on this issue.

BARKETT, Justice, concurring in part, dissenting in part.

I agree that Herring is entitled to a hearing on the conflict-of-interest question. However, I would also require, at the very least, a new sentencing hearing. I am dubious about the reliability and proportionality of a death sentence under the circumstances presented here and under current law. As the majority notes, Herring was nineteen years old at the time of the crime; he had a low IQ; a learning disability; and an abused childhood. These were all deemed to be mitigating circumstances. On the other hand, we have found that the weightiest aggravating circumstance, that of cold, calculated, and premeditated murder, is no longer valid in this case. With the remaining aggravating circumstances weighed against the significant mitigating factors and the fact that this robbery/murder differs little from many others wherein the death penalty was deemed inappropriate, I would remand for a new sentencing hearing.

KOGAN, J., concurs.

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580 So.2d 135, 16 Fla. L. Weekly 293

APPENDIX M

IN THE
SUPREME COURT OF FLORIDA

Case No.

TED HERRING,

Petitioner,

—v.—

JAMES V. CROSBY, JR., Secretary, Department of Corrections, State of Florida, BRADLEY D. CARTER, Warden, Union Correctional Institution, CHARLES CRIST, Attorney General, State of Florida.

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner TED HERRING, through his undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100, petitions this Court to issue a writ of habeas corpus. In light of the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Herring's death sentence is in violation of his rights under the United States Constitution and under the Constitution and laws of the State of Florida. Herring respectfully requests oral argument in support of his petition.

In support of his petition, in accordance with Florida Rule of Appellate Procedure 9.100(e), Herring states as follows:

I.

JURISDICTION

This is an original action under Florida Rule of Appellate Procedure 9.100(a). This Court has jurisdiction pursuant to Rule 9.030(a)(3) thereof and Article V, Section 3(b)(9) of the Florida Constitution.

II.

STATEMENT OF FACTS

On May 29, 1981, a convenience store clerk in Daytona Beach, Florida was shot and killed during a robbery at the store. On June 12, 1981, Herring was arrested while in possession of a stolen car. Herring was taken to the police station and interrogated, at which time he confessed to the killing of the store clerk during the May 29, 1981 robbery. *Herring v. State*, 446 So. 2d 1049, 1051-52 (Fla. 1984) ("*Herring I*").

In February 1982, Herring was tried for armed robbery and murder in the first degree arising out of the May 29, 1981 incident in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida (the "trial court"). On February 25, 1982, the jury returned a verdict of guilty on both counts. The sentencing phase of Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. The jury returned an advisory recommendation of death by an eight-

to-four vote. The trial judge found that four aggravating and two mitigating circumstances applied and sentenced Herring to death. *Id.* at 1052-53.

The aggravating circumstances that the trial judge found explicitly were: (1) Herring previously had been convicted of an unrelated robbery with a firearm; (2) the murder was committed while Herring was engaged in the commission of a robbery; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The mitigating circumstances the trial judge found were that: (1) Herring had a difficult childhood and had learning disabilities; and (2) Herring was nineteen years old at the time of the crime. *Id.* at 1053; (*see also* Petitioner's Appendix, filed concurrently herewith ("Pet. App.") Ex 1.)

During post-conviction proceedings pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, however, the trial judge explained the true—and entirely improper—reason he sentenced Herring to death:

> The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch" [the trial judge's words, not Herring's]; robbed and shot the clerk. *Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well.*

State v. Herring, No. 81-1957-CC, slip. op. at 5-6 (Fla. Cir. Ct. July 24, 1985) (emphasis added); (*see also* Pet. App. Ex 2 at 5-6.) The trial judge's written findings with respect

to sentencing did not disclose that he relied on a "perjury aggravator" in sentencing Herring to death. (Pet. App. Ex. 1.)[1]

III.

NATURE OF RELIEF SOUGHT

Herring seeks an order of this Court vacating his death sentence.

IV.

POST-CONVICTION PROCEDURAL HISTORY

Herring appealed from his judgment and sentence to this Court, which affirmed his judgment and sentence on February 2, 1984 and denied rehearing on April 11, 1984. *Herring I*, 446 So. 2d at 1049.

On March 5, 1982, Herring filed a motion for a new trial and a motion for a new penalty phase pursuant to Rules 3.580, 3.590 and 3.600 of the Florida Rules of Criminal Procedure in the trial court. As grounds therefor, Herring claimed that: (a) the verdict was contrary to law; (b) the verdict was contrary to the weight of the evidence; (c) the trial court erred in excusing for cause a prospective juror because of his views on capital punishment; (d) the trial court erred in allowing into evidence a taped statement made by Herring over Herring's objection; (e) the trial

[1] To the greatest extent permissible under the law and the Court's rules, Herring incorporates by reference in this Petition the entire contents of his record on appeal, all supplements thereto, and any and all other appendices, appeals, petitions, and documents previously transferred to or filed with this Court.

court erred during the penalty phase in refusing to allow Herring to introduce into evidence testimony regarding other first degree murder cases handled in Volusia County; and (f) the trial court erred during the penalty phase in not allowing defense counsel to read during his final argument to the jury poems Herring composed. On March 11, 1989, the trial court denied both motions. No evidentiary hearing was held.

On April 1, 1985, Herring filed a motion to vacate the judgment and sentence against him pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the trial court. As grounds therefor, Herring claimed that: (a) the "heightened premeditation" aggravating circumstance was erroneously and unconstitutionally applied; (b) the "avoidance of arrest" aggravating circumstance was erroneously and unconstitutionally applied; (c) both the "cold, calculated and premeditated" and the "avoidance of arrest" aggravating circumstances were applied on the basis of the same aspect of the crime and thus were improperly doubled; (d) the admission of a probation officer's testimony was erroneous and unconstitutional; (e) Herring's appointed counsel at sentencing rendered ineffective assistance of counsel; (f) the jury instructions regarding sentencing were constitutionally inadequate; (g) the trial judge failed to consider the proportionality of the death sentence in this case as compared with other cases in which the death penalty had been imposed; (h) the trial judge unconstitutionally surrendered to the jury his obligation to act as final arbiter in imposing the sentence; (i) Herring was sentenced pursuant to an arbitrary and racially discriminatory capital sentencing scheme; (j) the prosecutor improperly suggested that Herring might be granted parole if given life imprisonment during her closing argument; (k) the exclusion for cause of

a prospective juror because of his views on capital punishment violated Herring's constitutional rights; (l) Herring's trial jury did not constitute a representative cross-section of the community because of the exclusion of persons with conscientious or religious scruples against the death penalty; (m) Herring's trial jury was biased in favor of the state on issues of guilt or innocence; and (n) Herring's confession was improperly admitted into evidence. On July 24, 1985, the trial court denied the motion. No evidentiary hearing was held. Herring appealed to this Court, which affirmed the trial court's decision on December 30, 1986, and denied rehearing on March 2, 1987. *Herring v. State*, 501 So. 2d 1279 (Fla. 1986) ("*Herring II*").

On March 9, 1987, Herring filed a petition for a writ of habeas corpus pursuant to Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure in this Court. As grounds therefor, Herring claimed his appellate counsel rendered ineffective assistance of counsel for failing to raise the following claims: (a) the admission of the probation officer's testimony was constitutional error and impermissible under Florida law; (b) Herring's confession was constitutionally inadmissible; (c) the trial court impermissibly applied two aggravating circumstances on the basis of the same aspect of the shooting; (d) the jury instructions regarding the imposition of the death penalty were constitutionally inadequate; and (e) the prosecutor, in her closing argument, improperly argued that Herring was young enough to be out on the streets "to kill and rob again" if given life imprisonment. On June 23, 1988, this Court denied relief on the petition and denied rehearing on August 25, 1988. *See Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988) ("*Herring III*").

On March 9, 1989, Herring filed a successive motion to vacate his sentence in the trial court pursuant to Florida Rule of Criminal Procedure 3.850. As grounds therefor, Herring claimed that his death sentence was illegal under *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), because *Rogers* requires that the heightened premeditation aggravating circumstance include proof beyond a reasonable doubt of calculation, which consists of a careful plan or prearranged design to kill. On May 25, 1989, the trial court denied relief under *Rogers* but granted Herring leave to amend his 3.850 motion to claim that Herring's trial counsel harbored a conflict of interest in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

On November 5, 1989, the trial court summarily denied the amended motion without granting leave to take depositions and without conducting an evidentiary hearing. On March 8, 1990, Herring appealed to this Court, and, on May 2, 1991, the Court held that the heightened-premeditation aggravating factor should not have been applied to Herring at sentencing. Nevertheless, the Court declined to grant a new sentencing hearing. The Court did, however, remand the case for an evidentiary hearing with respect to Herring's trial counsel's conflict of interest. *See Herring v. State*, 580 So. 2d 135, 138 (Fla. 1991) ("*Herring IV*").

On remand, and after a hearing held on December 15-18, 1992, the trial court again denied Herring's motion pursuant to an April 2, 1993 decision. On April 21, 1993, Herring again appealed to this Court, and, on March 7, 1996, the Court vacated the trial court's ruling on the ground that the 3.850 evidentiary hearing was procedurally flawed. *See Teffeteller v. Dugger* (*Herring v. State*), 676

So. 2d 369 (Fla. 1996) ("*Herring V*"). A new hearing was then conducted in the trial court on November 25-27, 1996, and Herring's motion was again denied. Herring again appealed to this Court, which, on September 24, 1998, affirmed the denial of the 3.850 motion. *See Herring v. State*, 730 So. 2d 1264 (Fla. 1998) ("*Herring VI*").

On October 22, 1999, Herring filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. As grounds therefor, Herring claimed that: (a) in summarily upholding Herring's sentence despite the elimination of the heightened-premeditation aggravating circumstance, this Court's rulings were contrary to *Clemons v. Mississippi* and in violation of the Eighth and Fourteenth Amendments; (b) the trial court's application of a constitutionally impermissible non-statutory aggravating circumstance in sentencing Herring to death entitles Herring to a new sentencing hearing; (c) this Court erroneously applied the "avoidance of arrest" aggravating circumstance in violation of the Eighth and Fourteenth Amendments; (d) Herring's death sentence resulted from the improper doubling of aggravating circumstances in violation of the Eighth and Fourteenth Amendments; (e) this Court erred in admitting Probation Officer Mary White's testimony because Herring was not given *Miranda* warnings prior to his interview with the officer; (f) the surprise use of Officer White's testimony violated the Fifth, Sixth, Eighth and Fourteenth Amendments; (g) the use of Officer White's testimony improperly injected racial bias into the sentencing proceeding and was motivated by impermissible racial considerations; (h) in evaluating Howard Pearl's conflicts of interest under the Sixth and Fourteenth Amendments, the courts unreasonably applied *Cuyler v. Sullivan* to the facts of Herring's case; (i) Her-

ring's court-appointed counsel at the guilt and sentencing phases provided ineffective assistance in violation of Herring's Sixth and Fourteenth Amendment right to counsel; (j) Herring received ineffective assistance of appellate counsel in violation of the Sixth, Eighth and Fourteenth Amendments; (k) the instructions regarding the imposition of the death penalty were constitutionally inadequate; (l) the trial court erroneously excluded evidence properly offered by Herring in mitigation; and (m) the petitioner's rights under the Sixth and Fourteenth Amendments were violated by the exclusion of a prospective juror for cause, because of his views on the death penalty.

On April 14, 2003, the federal district court denied Herring's petition. On May 14, 2003, Herring filed a notice of appeal and an application for a certificate of appealability so his appeal from the denial of his federal habeas corpus petition may be heard by the United States Court of Appeals for the Eleventh Circuit. On June 19, 2003, the District Court denied the application for a certificate of appealability.

On June 20, 2003, Herring filed a motion in the trial court to vacate his death sentence pursuant to sections 3.850 and 3.851 of the Florida Code of Criminal Procedure. Specifically, Herring argues that his death sentence violates the Eighth and Fourteenth Amendments of the United States Constitution as interpreted in *Atkins v. Virginia*, 536 U.S. 304 (2002). The motion establishes clearly—through the report of a leading neuropsychologist, IQ testing, and school and medical records—that Herring is a person with mental retardation and that, therefore, he is ineligible for the death penalty. The motion is pending response by the State of Florida.

V.

HERRING'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *RING V. ARIZONA*

A. Ring invalidated Florida's capital sentencing scheme

In *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court held that the "Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Id.* at 597. Specifically, the Court held that Arizona's death sentencing statute was unconstitutional because it assigned the fact finding necessary to put the defendant to death to the judge and not the jury. *Id.* at 609.

Florida's death sentencing statute—under which Herring was sentenced—suffers from precisely the same constitutional flaw. Like the Arizona statute addressed in *Ring*, Florida's statute provides specifically that the judge, and not the jury, makes the factual findings necessary to put a defendant to death.

The statute itself provides explicitly that the trial judge—and not the jury—must make the necessary factual findings for a death sentence. Fla. Stat. § 921.141. Moreover, the United States Supreme Court has held repeatedly that under the Florida capital sentencing scheme, the trial judge alone makes the findings of fact necessary to impose death. *See, e.g., Hildwin v. Florida*, 490 U.S. 638 (1989).

Indeed, in *Walton v. Arizona*, the Supreme Court held that for Sixth Amendment purposes the Florida statute is *indistinguishable* from the very statute the Supreme Court later struck down in *Ring*:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does *not* make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. *A Florida trial court no more has the assistance of jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.*

497 U.S. 639, 648 (1990) (emphasis added). Accordingly, when the Supreme Court struck down the Arizona statute, it implicitly invalidated the Florida sentencing scheme as well.

This conclusion is confirmed by this Court's ruling in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001). In *Mills*, this Court noted that in *Walton*, the Supreme Court "addressed a capital sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury. Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Id.* at 536-37. But in *Ring*, the Supreme Court *did* hold that the Sixth Amendment right recognized in *Apprendi* extends to capital sentencing and overruled *Walton*. Thus, as this Court recognized in *Mills*, if *Walton* is unconstitutional, so too is the Florida capital sentencing scheme.

In addition to *Mills*, the Florida courts have held repeatedly that a Florida jury's participation in capital sentencing is only advisory and that the trial judge alone makes the findings of fact necessary to impose death. *See, e.g., Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986) (the jury

does not "bear[ ] the same degree of responsibility as that brought on a by a 'true sentencing jury'"); *Odom v. State*, 403 So. 2d 936, 942 (Fla. 1981) (jury's role restricted to announcing "the judgment of the community as to whether the death penalty is appropriate"); *Johnson v. State*, 393 So. 2d 1069, 1074 (Fla. 1980) ("[t]he function of the jury in the sentencing phase [*i.e.*, recommending] . . . is not the same as the function of the jury in the guilt phase [*i.e.*, fact finding]"); *accord Van Royal v. State*, 497 So. 2d 625, 628 (Fla. 1986); *Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983); *Davis v. State*, 703 So. 2d 1055, 1061 (Fla. 1997); *Grossman v. State*, 525 So. 2d 833, 840 (Fla. 1988); *Morton v. State*, 789 So. 2d 324, 333 (Fla. 2001). Or, as Justice Shaw put it in *Combs v. State*, "the jury's recommendation is merely advisory [and] *not supported by findings of fact*." 525 So. 2d 853, 859 (Fla.1988) (Shaw, J., concurring) (emphasis added).

Finally, post-*Ring*, the Florida capital sentencing scheme can no longer coexist with the United States Supreme Court's ruling in *Caldwell v. Mississipi*, where the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. 320, 328-29 (1985). Herring's jurors were not only "led to believe" that the responsibility for determining his death rested elsewhere, they were *formally instructed* that "the final decision as to what punishment shall be imposed, is the *responsibility of the Judge*." (App. Ex C. at 815-16) (emphasis added). Thus, the Florida statute, as applied to Herring, could not have satisfied *both* the requirements of *Ring* and the requirements of *Caldwell* at once.

This Court first addressed the constitutionality of Florida's capital sentencing scheme in the wake of *Ring* in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.) (*per curiam*), *cert. denied*, 123 S. Ct. 622 (2002). There, the Court held that it is for the United States Supreme Court to instruct Florida that its capital sentencing scheme violates *Ring* and that, in the absence of such an instruction, the Court would not vacate Bottoson's sentence. *Id.*

Notwithstanding the Court's *per curiam* ruling in *Bottoson*, the concurring opinions of individual justices expressed grave doubt that the Florida scheme can be reconciled with *Ring*. Chief Justice Anstead expressed "concerns that Florida's scheme may not comply with the Sixth Amendment as now construed in *Ring*" because in Florida the trial judge alone determines the existence of aggravators and thus makes the findings necessary for the death penalty to be imposed. *Id.* at 704-05. Similarly, Justice Pariente wrote that "*Ring* does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme" because, among other things, "[t]he jury does not *find* specific aggravating factors. Thus, it is the jury that recommends a sentence and the judge who *finds* the specific aggravators." *Id.* at 719. In addition, Justice Shaw concluded that *Ring* "has a direct impact on Florida's capital sentencing statute" because Florida law requires a unanimous jury finding for any element of criminal offense, and "[n]owhere in Florida [capital sentencing] law is there a requirement that the finding of an aggravating circumstance must be unanimous." *Id.* at 717.

To date, neither the United States Supreme Court nor any other federal court has issued a decision answering the question of whether Florida's capital sentencing scheme

survived *Ring*. This Court thus far has adhered to its *per curiam* decision in *Bottoson*—but not without dissent. *See, e.g.*, *Butler v. State*, 842 So. 2d 817, 840 (Fla. 2003) (Pariente, J., dissenting in pertinent part); *see also id.* at 835 (Anstead, C.J., dissenting in pertinent part); *id.* at 834 (Shaw, J., dissenting in pertinent part).

Herring respectfully submits that it is error for this Court to uphold Florida death sentences post-*Ring* while awaiting definitive guidance from the United States Supreme Court. State courts routinely apply their judgment and discretion to questions of constitutional law without specific instructions from the federal courts. The Court need not and should not refrain from doing so where, as here, a person's life is at stake.

Accordingly, because the trial judge, and not the jury, made the findings of fact necessary to impose death, Herring's sentence should be vacated pursuant to *Ring*.

B. Even if Florida's capital sentencing scheme remains constitutional, Herring's death sentence still cannot be reconciled with *Ring*

As will be shown below, even if the Court adheres to its decision in *Bottoson*, there are ample grounds to vacate Herring's sentence based on the specific circumstances of this case.

1. The 8-4 split in Herring's jury renders his sentence unconstitutional under *Ring*

To the extent the Florida capital sentencing scheme survives *Ring*, it is because the jury plays a role. *See Bottoson*, 833 So. 2d at 701 (Quince, J. concurring) ("the basic premise of *Ring* has been fulfilled under the Florida

statute. That is, the trial judge does not make the sentencing decision alone.") Indeed, there is no other basis to differentiate the Florida statute from the Arizona statute struck down in *Ring*.

If it is jury participation that saves the Florida scheme, then such participation must conform to the requirements of the Florida Constitution and the United States Constitution as interpreted in *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As Justice Pariente explained in the recent *Butler* case, "*Ring*, considered in tandem with the jury-trial guarantee [requiring unanimity] in article I, section 22 of the Florida Constitution" requires the reversal of a death sentence where the jury's advisory sentence is non-unanimous. *Butler*, 842 So. 2d at 836.

Prior to *Apprendi* and *Ring*, the absence of unanimity did not appear to be a problem because the United States Supreme Court had not yet recognized a "Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Hildwin*, 490 U.S. at 640 (citations omitted) (pre-*Ring* decision upholding Florida capital sentencing scheme). When the Supreme Court overruled that principle in *Apprendi*, and later *Ring*, jury unanimity became a *sine qua non* for valid capital sentencing. *See Bottoson*, 833 So. 2d at 710 (Anstead, C.J., concurring) ("However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote . . . . This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in *Apprendi* and *Ring*.")

A full third of Herring's jury voted against death. The recommendation of so deeply divided a panel simply cannot serve as the basis for a death sentence in light of *Ring*. As Justice Scalia explained, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610. Thus, under *Ring*, the predicates for death must be found by the jury, and, under Florida law, the jury must be unanimous. Fla. Const. Art. I, § 22; *accord Jones v. State*, 92 So. 2d 261 (Fla. 1956); *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (key principal of American criminal justice system is that defendant's guilt will be "determined beyond a reasonable doubt by the *unanimous* vote of 12 of his fellow citizens")

Because Herring's panel was divided eight to four, his death sentence violated his right under the Florida and United States constitutions to unanimous jury findings beyond a reasonable doubt on all factors necessary to sentence him to death.

2. The trial judge's reliance on an uncharged statutory aggravator violated Herring's rights under *Ring*

Ring requires that the jury make all of the factual findings necessary to impose death. Even assuming, *arguendo*, that the Florida capital sentencing scheme meets this requirement, a death sentence obviously cannot be based on findings that the jury *did not make*. Here, the trial judge has admitted that the basis of *his* decision to impose death was not the recommendation of the jury but rather *his* con-

clusion that Herring committed perjury. (Pet. App. Ex. B at 5-6.) None of the trial court's instructions to the jury advised them that perjury was an appropriate consideration in determining either guilt or the appropriate sentence because it obviously was an improper consideration. (Pet. App. Ex. C at 815-21.)

Thus, even if in its formulation the Florida scheme provides for the judge and jury to decide death "together," there is conclusive factual evidence that here trial judge decided death alone. The jury was not told that perjury was a relevant consideration, and assuming, as one must, that the jury adhered faithfully to the court's instructions, *there was no jury consideration of Herring's perjury*. Accordingly, Herring was deprived of his right under the Sixth and Fourteenth Amendments of the United States Constitution to have a jury determine (or, at a minimum, participate in the determination of) all of the factual predicates to his death sentence.[2]

3. The trial court's constitutionally inadequate jury instructions deprived Herring of his right under *Ring* to have the jury make the factual determinations necessary to his sentence

The failure of a trial judge to properly charge an advisory jury in a death penalty case was a serious error before *Ring*. In light of the newly recognized constitutional requirement that jurors make the predicate findings, how-

2 The trial judge's consideration of perjury also was improper because it treated constitutionally protected conduct (*i.e.*, testifying) as the basis of an aggravating factor, *see Zant v. Stephens*, 462 U.S. 862 (1983), and impermissibly considered a non-statutory aggravating factor. *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997).

ever, such instructions are far more significant now. Here, even assuming the constitutionality of the Florida capital sentencing scheme, the jury did not and could not discharge its obligations because the trial judge provided inadequate instructions at sentencing.

The jury instructions regarding aggravating circumstances were presented with so little guidance that the aggravating circumstances in this case could conceivably have been interpreted to cover *every* first-degree murder. (Pet. App. Ex C at 815-21.) The Supreme Court repeatedly has emphasized that the Constitution requires that a capital sentencing jury's discretion in recommending the imposition of the death penalty be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty in order to eliminate arbitrariness and capriciousness. *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Zant*, 462 U.S. at 890. "Because the channeling function of an aggravating circumstance requires an objective determination by the sentencer, an aggravating circumstance must be described in 'terms that are commonly understood, interpreted and applied.'" *Newlon v. Armontrout*, 885 F.2d 1328, 1334 (8th Cir. 1989) (quoting *Cartwright v. Maynard*, 822 F.2d 1477, 1485 (10th Cir. 1987), *aff'd*, 486 U.S. 356 (1988)).

Unless aggravating circumstances are sufficiently explained, the "standard may be so vague that it would 'fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* . . . could occur.'" *Id.* at 1334 (quoting *Zant*, 462 U.S. at 877). The instructions given to the jury in Herring's case were contrary to clearly established Supreme Court

precedent. *Maynard*, 486 U.S. at 356. Accordingly, the jury could not have fulfilled its constitutionally mandated finding of all facts necessary for the imposition of death.

In this case, the trial judge's sentencing charge—which was derived from but did not constitute the full set of standard jury instructions in effect in Florida at the time—failed to provide the clear, precise guidance that is constitutionally mandated and failed to give any guidance on the meaning of the aggravators. The instructions began with the following remarks:

> It is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first degree murder.
>
> As you have been told, the decision as to what punishment shall be imposed, is the responsibility of the Judge. However, it's your duty to follow the law that will now be given to you by the Court and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty. And whether sufficient mitigating circumstances exist, outweigh the aggravating circumstance found to exist. Your advisory sentence should be based upon the evidence that you've heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

(Pet. App. Ex. C at 815-16.) The trial judge then simply read certain of the aggravating and mitigating circumstances listed in the statute. The entire charge consists of only six pages of transcript. (*Id.* at 815-21.)

The quoted portion of the instructions was deficient in several respects. First, the court failed to define the terms "aggravating circumstance" and "mitigating circumstance" in charging the jury, or to explain their nature or function in the sentencing process. "[I]f 'an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibilities to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die.'" *Cartwright*, 822 F.2d at 1485 (citation omitted). Here, the trial judge gave no indication that the aggravating circumstances were factors which distinguished this particular capital felony from most other homicides, and that, before an advisory verdict of death could be rendered, the jury had to find the existence of at least one of the statutory aggravating circumstances beyond a reasonable doubt. Because of the critical importance of these terms in the sentencing scheme, it was unfair to use the terms without explanation, or to assume that a jury would immediately comprehend their nature or function in the sentencing process.

The trial judge's instructions also failed to explain the nature of the balancing process, and were thus similar to the instructions struck down by the Eleventh Circuit in *Moore v. Kemp*, 809 F.2d 702, 730-33 (11th Cir. 1987). Although the trial judge indicated that the aggravating and mitigating circumstances had to be "weighed" against one another, he did not clearly explain how the jury was to undertake such an analysis. The jury was never told directly that they could vote for life even if they found that an aggravating circumstance had been proven. Nor was the jury told that they could vote for life even if they did not

find that any of the statutory mitigating circumstances had been proven. Thus, the jury "could easily have gotten the impression that the existence of an aggravating circumstance necessitated a death sentence." *Id.* at 733. Notably, the trial judge also omitted any reference to Florida's well-settled rule that the weighing process is not a mere "mechanical tabulation" of aggravating versus mitigating circumstances. *See Brown v. State*, 381 So. 2d 690, 696 (Fla. 1980); *State v. Dixon*, 283 So. 2d 1, 5 (Fla. 1973). Nor did he explain to the jury how aggravating circumstances could "outweigh" mitigating circumstances, or vice versa.

The trial judge also failed to give any common sense examples of each aggravating circumstance, and he did not provide any explanation or guidance as to the meaning of the particular aggravating circumstances. The judge made no reference to the salient points of law developed by the Florida courts in construing these circumstances. Specifically, the trial judge did not explain to the jury that the avoidance of arrest aggravating circumstance requires a demonstration that avoidance of arrest was the dominant or sole motive for the capital felony. The judge also did not explain that the "cold, calculated and premeditated" aggravating circumstance requires a showing of heightened premeditation beyond that required for a first-degree murder conviction. The meaning of these circumstances is not readily apparent to the layman without some further explanation, and the jury was given no guidance as to their meaning. They were thus left to interpret these circumstances in ways inconsistent with constitutional requirements.

As a result, the court deprived Herring of a valid determination by the jury of all elements necessary for his conviction as required by *Ring*.[3]

4. Herring's sentence must be vacated because the trial court charged the jury with an improper aggravator

In response to Herring's second 3.850 motion, the Florida Supreme Court struck down the cold, calculated and premeditated aggravating factor, holding that it "no longer applies to the circumstances in *Herring*." *Herring IV*, 580 So. 2d 135, 138 (Fla. 1991). Nevertheless, at that time, this Court declined to vacate Herring's sentence. *Id.* The *Ring* decision, however, casts the issue in an entirely new light.

In *Clemons v. Mississippi*, 494 U.S. 738 (1990), the United States Supreme Court held that an appellate court can cure error resulting from improper application of an aggravating circumstance by either reweighing the sentence or by conducting a harmless error analysis. *Id.* Even assuming that this Court properly conducted the *Clemons* review, it is clear after *Ring* that the review violated Herring's constitutional rights under the Sixth and Fourteenth Amendments. In *Clemons*, the Supreme Court stated:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid

[3] Moreover, as Justice Shaw noted in *Bottoson*, in light of *Ring*, Florida's sentencing instructions in capital cases may "no longer be valid" in any event. 833 So. 2d at 730 (Shaw, J., concurring).

> remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

494 U.S. at 745. But *Ring* held that capital defendants are "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000)). The rationale permitting this Court to reweigh the aggravating and mitigating circumstances thus no longer exists.

This Court struck down one of the aggravating factors considered by the jury. Even if the Court's reweighing or harmless error analysis previously was sufficient under *Clemons*, *Ring* invalidated the analysis as there is no telling how this factor implicated the jury's recommendation of death. Unlike "automatic aggravator" states where the presence of a single aggravator is the only fact required to support a death sentence, in Florida there must be a separate factual finding that the aggravators are "sufficient," and yet another factual finding that these aggravators "outweigh" the mitigating circumstances. Fla. Stat. § 921.141. Accordingly, where, as here, an aggravator that the jury relied on has been stricken, it violates *Ring* for this Court to substitute its judgment for that of the jury in deciding whether the remaining aggravators were sufficient to warrant a recommendation of death. *Cf. Stromberg v. California*, 283 U.S. 359, 367-68 (1931) ("The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set

forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause.")[4]

When this Court decided the *Clemons* issue in *Herring IV*, it admittedly was not clear that the Court was intruding upon a function constitutionally reserved for the jury. After *Ring*, however, it is perfectly clear that this Court's striking of the cold, calculated and premeditated aggravator required that Herring's sentence be vacated.[5]

5. Herring's felony convictions do not preclude a *Ring* claim

As noted previously, among the aggravators found in this case were prior and contemporaneous felony convictions. In its post-*Bottoson* opinions, this Court has suggested that the presence of such convictions may preclude

[4] In *Duckett v. Mullin*, 306 F.3d 982, 1002 n.11 (11th Cir. 2002), the court noted that there is a question as to "whether the Court's holding in *Clemons* will survive in light of the recent decision in *Ring v. Arizona* . . . .")

[5] Indeed, this Court's jurisprudence strongly suggests that cold, calculated and premeditated aggravator is given comparatively great weight by judges and advisory juries alike. *See, e.g., Bowles v. State*, 804 So. 2d 1173, 1176 (Fla. 2001) (trial court assigned "great weight" to cold, calculated and premeditated aggravator). Accordingly, allowing Herring's sentence to stand where the jury more likely than not gave great weight to this stricken factor would be particularly inconsistent with *Herring*'s rights under *Ring*.

relief under *Ring*. *See, e.g.*, *Banks v. State*, 842 So. 2d 788, 793 (Fla. 2003).

The rationale for these opinions appears to be the so-called "prior conviction exception" originating from *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In substance, this Court's rationale for rejecting *Ring* claims by petitioners with prior or contemporaneous felony convictions appears to be that, because a jury has found the commission of such a felony unanimously and beyond a reasonable doubt during the guilt phase, the jury has also, by definition, found an aggravator sufficient to impose death. For the reasons set forth below, this reasoning does not satisfy *Ring*.

First, applying a prior or contemporaneous felony exception ignores *Ring*'s requirement that the jury make *every* factual finding necessary to impose death. *Ring*, 536 U.S. at 597. Unlike states where the finding of a single aggravator renders a defendant death-eligible, the Florida statute makes clear that a series of independent factual findings are necessary to impose death. Specifically, the Florida statute requires a factual finding of (a) "sufficient aggravating circumstances;" and (b) "insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141. In other words, the fact-finder's role does not end when it determines that an aggravator exists. It must also make a factual determination as to whether the aggravators are "sufficient." If the aggravators are sufficient, the fact-finder then must make factual findings as to any applicable mitigating circumstances. Once that is done, the fact-finder must make a determination as

to whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances.[6]

Accordingly, the fact that the jury has made the predicate factual finding for a violent felony aggravator does not strip the defendant of his right to have the jury determine whether the aggravator is "sufficient," nor does it deprive the defendant of his right to have the jury determine (i) whether mitigating circumstances are present; and (ii) if so, whether those circumstances are sufficient to outweigh the aggravators. Here, there is no dispute that the Court, and not the jury, made the factual finding that Herring's aggravators were "sufficient" and made all of the factual findings with respect to mitigating circumstances. As such, Herring's conviction violates *Ring* regardless of whether the jury found prior and contemporaneous violent felonies. Nothing in *Ring* or *Apprendi* is to the contrary.

This interpretation is consistent with Nevada's interpretation of its own, similar death penalty statute. As the Nevada Supreme Court explained:

> Nevada statutory law requires two distinct findings to render a defendant death—eligible: "The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3). This second finding regarding mitigating circumstances is necessary to authorize the death penalty in

[6] In appropriate cases, this Court has held that a felony aggravator standing alone may be insufficient for the imposition of death. *Cf. Chaky v. State*, 651 So. 2d 1169, 1173 (Fla. 1995); *Jorgenson v. State*, 714 So. 2d 423, 428 (Fla. 1998).

> Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing.

Johnson v. State, 59 P.3d 450, 460 (Nev. 2002).

Similarly, on remand after the Supreme Court's decision in *Ring*, the Arizona Supreme Court clarified that "Arizona's statutes require *more than* the presence of one or more statutorily defined aggravating factors . . . [and] the *trier of fact* must determined whether mitigating circumstances call for leniency." *State v. Ring*, 65 P.3d 915, 915-16 (Ariz. 2003) (emphasis added). A system whereby the jury determines the aggravator (i.e., a prior felony), and the judge makes factual findings as to mitigating circumstances, cannot satisfy *Ring*. All such facts must be determined by the jury. Thus, the presence of a prior or contemporaneous felony simply cannot shield a death sentence from *Ring* scrutiny.

Second, the Supreme Court's decision in *Almendarez-Torres*, which is the root source of the so-called violent felony exception to the Sixth Amendment, is neither good law nor applicable here. *Almendarez-Torres* "stands for the proposition that not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be not so charged." *Jones v. United States*, 526 U.S. 227, 248 (1999).

Almendarez-Torres rests on the now discredited proposition that a legislature may determine whether a particular requirement for sentencing constitutes a mere sentencing factor or an element of the crime. *Almendarez-Torres*, 523 U.S. at 228. *Ring* eviscerated this notion by making clear that these labels do not matter. *Ring*, 536 U.S. at 605

(aggravating circumstance necessary for imposition of a death sentence operates as the "functional equivalent" of an element of a greater offense and must be found by the jury.) (emphasis added); *id.* at 610 (Scalia, J., concurring) ("whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—[they] must be found by the jury beyond a reasonable doubt").

Moreover, even before *Ring*, the Supreme Court's decisions in *Jones* and *Apprendi* had all but buried *Almendarez-Torres*. In *Apprendi*, the majority noted that "it is arguable that *Almendarez-Torres* was incorrectly decided" but because the defendant in *Apprendi* did not contest the application of the exception, the Court did not need to "revisit" *Almendarez-Torres* at that time. *Apprendi*, 530 U.S. at 489. In *Jones*, which pre-dated the Court's decision in *Apprendi*, the Court noted that *Almendarez-Torres* was limited it to its facts, which involved Fifth Amendment indictment-related rights, rather than the Sixth Amendment right to a jury. *Jones*, 526 U.S. at 248 (1999) (*Almendarez-Torres* was limited to the "rights to indictment and notice" and is perhaps not applicable in a case "concerned with the Sixth Amendment right to jury trial.") Accordingly, Herring's felony convictions do not preclude relief under *Ring*.

V.

IN LIGHT OF RING, HERRING'S INDICTMENT IS CONSTITUTIONALLY DEFECTIVE

Herring's death sentence also must be vacated because all elements of the offense necessary to establish the crime of which he was convicted were not charged in the indict-

ment. (Pet. App. Ex D.) In *Jones*, the Supreme Court made clear that once the determination of a fact is elevated to an element of an offense, it *must* be charged in the indictment. 526 U.S. at 232 ("[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.")

In *Ring*, the Supreme Court held that where a statute's sentencing scheme makes aggravating factors a prerequisite to the imposition of the death penalty those "aggravating factors operate as 'the functional equivalent of an element of a greater offense . . .'" *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). Accordingly, since the aggravating factors that elevated Herring's sentence to death were not included in his indictment, Herring's sentence is in violation of his constitutional rights as illuminated by *Ring*.

Shortly after the Court's decision in *Ring*, the Supreme Court vacated the judgment of the United States Court of Appeals for the Eighth Circuit in *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), *vacated*, 536 U.S. 953 (2002), in light of *Ring*'s holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. The Eighth Circuit previously had rejected the argument that aggravating factors must be alleged in the indictment because it held that aggravators are not elements of federal capital murder but rather they are "sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence." *United States v. Allen*, 247 F.3d at 763. Similarly to the statutes in question in *Allen*, Florida's death

penalty statute makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, that those aggravators are sufficient to warrant the death penalty, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. *See* Fla. Stat. § 921.141(3). Accordingly, Herring' sentence must be vacated for the same reasons the sentence in *Allen* was vacated.

The Florida Constitution also provides that, "[n]o person shall be tried for capital crime without presentment or indictment by a grand jury." Fla. Const. art. 1, § 15. Moreover, this Court has held repeatedly that Florida law requires every "element of the offense" to be alleged in the information or indictment. *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977) ("[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference."); *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983) ("[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state" and is subject to attack on petition for writ of habeas corpus); *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996) ("[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."). Accordingly, because *Ring* made the statutory aggravating and mitigating circumstances elements of Herring's offense, the State's failure to include them in the indictment clearly violated Florida law.

Moreover, while the Supreme Court has noted that the Grand Jury clause of the Fifth Amendment has not been held to apply to the states, *Apprendi*, 530 U.S. at 477 n.3, the Sixth and Fourteenth Amendments to the United States Constitution clearly require that "[i]n all criminal prosecu-

tions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." *State v. Gray*, 435 So. 2d at 816.

VI.

RING APPLIES RETROACTIVELY

Ring applies retroactively to Herring. This Court set the criteria by which a change in law should be applied retroactively in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). A change in law, according to *Witt*, applies retroactively in post-conviction capital proceedings when "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id.* at 931.

Ring easily satisfies each of these requirements. *First*, it was decided by the United Statpe Supreme Court. *Second*, it is constitutional in nature. *Third*, there can be no question that it constitutes a development of fundamental significance. The right to trial by jury in a capital proceeding is perhaps the most sacrosanct right in our system of justice. As Justice Shaw explained in his concurring opinion in *Bottoson*, Ring "is of 'fundamental significance' for its purpose is to safeguard the basic protections guaranteed by the right to trial by jury." 833 So. 2d at 717. As Justice Shaw also pointed out, prior to *Ring*, this Court repeatedly has applied significant capital sentencing decisions retroactively. *Id.* at 717 n.50 (citing cases).

In addition, in all of the reported cases raising *Ring* claims, this Court addressed the claim on its merits. *Apprendi* and *Ring* (with *Walton* intervening) were decided approximately 20 years after Herring was sentenced.

Absent prescience, there was no reason for him to raise a *Ring* claim earlier.

VII.

CONCLUSION

For all of the foregoing reasons, Petitioner Ted Herring respectfully requests this Court to issue a writ of habeas corpus vacating his sentence.

Dated: June 23, 2003

Respectfully submitted,

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APPENDIX N

CONSTITUTION OF THE STATE OF FLORIDA

AS REVISED IN 1968 AND SUBSEQUENTLY AMENDED

ARTICLE I

DECLARATION OF RIGHTS

SECTION 22. **Trial by jury.**—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

APPENDIX O

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 81-1957-CC

STATE OF FLORIDA,

—VS.—

TED HERRING,

Defendant.

ORDER

THIS CAUSE coming on to be heard upon Defendant's Motion for 3.850 relief; and the Court having read the Defendant's Motion (pages 1-102, and exhibits), and the response of the State thereto; the Court file; the trial transcript; and the decision of *Herring vs. State*, 446 So.2d 1049 (FL. 1984); and the Court being otherwise fully advised in the premises finds as follows:

1. The Defendant was found guilty by a jury of first degree murder and robbery with a firearm. By a vote of eight (8) to four (4) the jury recommended the Defendant be sentenced to death. On March 1, 1982 this Court did

sentence the Defendant to death for the murder, and imposed a 99 year sentence for the robbery.

2. The Florida Supreme Court affirmed the conviction and sentence (*Herring vs. State*, 446 So.2d 1049 (FL. 1984)). Certiorari was denied by the United States Supreme Court (*Herring vs. State of Florida*, 1055 S.Ct. 396, 83 L.Ed. 330 (1984).

3. The Florida Supreme Court decision at 446 So.2d 1049 dealt with the following issues:

A. Whether the trial court erred in excusing a death-scrupled juror.

B. Whether the trial court should have allowed defense counsel for other first degree murder defendants to testify that their client received life sentences for similar crimes.

C. Whether the trial court correctly excluded defense counsel from reading poems of the Defendant contained in a clinical report.

D. Whether the trial court improperly found as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest.

E. Whether the trial court improperly found the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

F. Whether the death sentence is appropriate in light of other decisions.

4. This Court does agree with the State of Florida that many of the matters complained of in Defendant's motion were or could have been raised on direct appeal. This

Court will not consider these matters as a basis for 3.850 relief. Specifically, the following matters were or could have been raised on direct appeal:

A. The applicability of the cold and calculating aggravating factor.

B. The applicability of the avoiding arrest aggravating factor.

C. That the heightened premeditation and the avoidance of arrest aggravating circumstances were applied on the basis of the same aspect of the shooting, and were thus improperly doubled.

D. The admission of the probation officer's testimony was constitutional error.

E. The jury instructions regarding the imposition of the death penalty were constitutionally inadequate.

F. The trial judge failed to consider the proportionality of the death sentence with sentences imposed in other cases.

G. The trial judge unconstitutionally surrendered to the jury his obligation to act as final arbiter in imposing the sentence.

H. The Defendant was sentenced by an arbitrary and racially discriminating capital sentence scheme.

I. The prosecutor improperly suggested that petitioner might be granted parole if given a life sentence.

J. The exclusion of the death-scrupled jurors.

K. That Defendant's confession was improperly admitted into evidence.

5. The real nub of Defendant's motion is the claim of ineffective trial counsel. Despite the standards set forth in *Knight* and *Strickland* it is very difficult to go back and determine whether trial counsel's actions or inactions amounted to ineffective assistance of counsel. The Court will attempt to deal with the allegations of ineffectiveness and analyze them in light of *Knight* and *Strickland.*

A. In Paragraph "85" of the 3.850 the Defendant alleges there were reports (see Defendant's exhibits "3" and "4") that the Defendant had serious mental and emotional problems. The Defendant now complains these reports should have been introduced. First it should be noted that at least one of the reports was a result of an interview done when the Defendant was 13 years old. Secondly, the defense did establish learning disabilities and psychological problems through the testimony of the Defendant's mother. Thirdly, one of the reports indicates the mother, who was a defense witness and represented to be a concerned mother, was not keeping the child's appointments with the counselor. Lastly, the reports indicate the Defendant was of dull normal intelligence. Taking this all into consideration this Court does not find the failure to introduce these reports was a professional deficiency.

B. In Paragraph "86" of the 3.850 the defense claims trial counsel failed to adequately present other readily available mitigation evidence. This is perhaps the most difficult assertation to analyze. Here more than any other area there is tendency to second guess. In every case that is lost counsel may go back, with the advantage of hindsight, and say this or that should or could have been done.

The defense had the Defendant's mother testify during the sentencing phase. She did establish the Defendant's home life was not good; his parents were separated; he was hyperactive with a low IQ and a learning disability; he had psychological problems; that his mother loved Ted. The psychological reports would have been cumulative to the mother's testimony. It also most be stressed that the trial court did list and consider these matters as mitigating factors.

As to the information set forth in exhibits "7" and "8" the Court questions the importance of the information from the Defendant's former teachers. Obviously much time had passed since they had contact with the Defendant. Their testimony was of doubtful value.

Perhaps the defense should have had the Defendant's other relatives testify on his behalf. While to a large degree it may have been cumulative to that of the mother, perhaps it may in someway have helped the Defendant. But this Court cannot conclude that trial counsel was deficient in presenting the mother alone. It must be remembered that the area of who trial counsel selects to testify if frought with peril. Even the mother, who was an effective defense witness, did admit her son was involved in drug related problems in New York. So trial counsel is caught in a dilemma. He must try to put on mitigating evidence yet not let the State have an opportunity to further damage the Defendant either by cross or rebuttal. This is especially true where the Defendant was charged with several other armed robberies and apparently was having drug related problems in New York City. All in all the Court finds trial counsel was not deficient in only presenting the mother's testimony. This is a matter of trial strategy and should not be second guessed.

C. The defense now contends that trial counsel should have challenged the State's argument that the murder was cold, calculated and premeditated. Yet the Defendant denied he was the one who shot Dale Hoeltzel. He claimed another person murdered the clerk. In any case, the Florida Supreme Court did ultimately determine the murder to be cold, calculating and premeditated.

D. As to the testimony of the probation officer, Mary White, defense counsel did object to statements allegedly made by the Defendant to White. The defense now claims he did not object for the right reasons nor cite proper case law. This contention may be correct in light of *Sireci vs. State*, 399 So.2d 964. Yet counsel did object to and oppose the testimony. Also the State had yet to concede that the murder was not heinous, atrocious, and cruel. The Court finds this act or omission was not a substantial and serious deficiency measurably below the standard of performance expected of a competent attorney.

E. Paragraph 104 complains that trial counsel did not object to cross by the State as to why the Defendant's mother sent Herring to Florida. Yet the door was opened to this cross because on direct the mother testified she sent him to Florida about two years ago. The State had the right and duty to ask why he was sent to Florida. A defense objection to this line of questioning would have been overruled. Again this particular complaint in the 3.850 shows how trial counsel is "damned if he does and damned if he doesn't." Most certainly the 3.850 would complain if the mother were not called to testify; now the 3.850 complains about matters her testimony opened the door to.

F. Paragraph 109 complains about trial counsel's failure to properly introduce Defendant's poems (see 3.850 exhibit "3"). Essentially trial counsel tried to "sneak" in the poems. He was caught and prevented from doing it. Had he introduced the St. Luke's Hospital report containing the poems it would have shown the poems were not original but rather based on popular songs. Also the second page of the report again indicates the mother of the Defendant was not keeping appointments. This would have contradicted her testimony that she did all she could for Ted.

Trial counsel did not correctly try to introduce the poems. But again the Court cannot say this was a serious professional deficiency. Finally, the Court cannot say the Defendant was prejudiced by not having the poems introduced, or if they were introduced the result would be any different.

G. Paragraph 112 complains of trial counsel's failure to properly and successfully argue that testimony should be allowed showing that similar cases resulted in non-death sentences. The Florida Supreme Court specifically held this testimony was not admissible (see *Herring* at Pages 1056 and 1057). Despite what arguments the defense now makes, that type of testimony was not admissible.

H. Paragraph 119 and 120 complain trial counsel told the jury not to consider the age of the Defendant as a mitigating factor. This Court accepts the State's version (see Page 10 of State's response). Mr. Quarles definitely did argue to the jury that age was a mitigating factor, and this Court found it to be so.

6. This court must view trial counsel's alleged errors and omissions in light of the case as a whole. It was a difficult case from the defense standpoint. The Defendant confessed to the crime. Efforts to suppress the confession failed. The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch"; robbed and shot the clerk. Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well. There was little the defense could do to save the Defendant after that.

Additionally, the aggravating factors in this case strongly outweighed the mitigating factors. There were four aggravating and only two mitigating factors. The mitigating factor of age was not strong. The Defendant was at the point where his age was not that much of a consideration. Other non-statutory mitigating factors were in fact established by the defense. They were considered by the jury and the court. These mitigating factors were not particularly significant. This Court finds that even if the non-statutory mitigating factors were bolstered by teacher's statements, comments of relatives, and poems of the Defendant, the result would be no different.

7. The Court concludes that the *Knight/Strickland* tests are not met. The trial defense was not deficient, nor did it prejudice the Defendant. The Defendant received a fair trial and a fair sentence hearing.

8. The Court carefully considered holding an evidentiary hearing on this matter. The Court is aware that normally allegations of ineffective assistance of counsel, especially in capital cases, require a hearing. However, after careful-

ly reviewing the record, the court file, the 3.850 motion, and the State's response, all matters necessary for this court or any other reviewing court to fairly rule on the defense allegations are set forth in the existing records. There is no need for further hearings or evidence. The Court also finds the above records conclusively demonstrate the Defendant is not entitled to relief, and the motion may be denied without an evidentiary hearing.

WHEREFORE, it is ORDERED that Defendant's Motion for 3.850 relief is denied.

DONE AND ORDERED this 24 day of July, 1985, at Daytona Beach, Volusia County, Florida.

Defendant has 15 days from the date hereof to file his Motion for Rehearing, and 30 days to file his Notice of Appeal.

/s/ S. JAMES FOXMAN
S. JAMES FOXMAN CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Order have been mailed and/or delivered to the following persons this 25 day of July, 1985:

Lewis R. Stark, Assistant State Attorney, Courthouse Annex, 125 East Orange Avenue, Daytona Beach, FL 32014;

Jeremy G. Epstein, Attorney for Defendant, Shearman and Sterling, 53 Wall Street, New York, NY 10005.

/s/ VICKY L. MYERS
JUDICIAL ASSISTANT

(2)

Supreme Court, U.S.
FILED
APR 12 2004
OFFICE OF THE CLERK

DOCKET NO. 03-1284

IN THE SUPREME COURT OF THE UNITED STATES

TED HERRING,
Petitioner,

v.

JAMES V. CROSBY, SECRETARY,
DEPARTMENT OF CORRECTIONS, FLORIDA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether this Court should exercise certiorari jurisdiction to review the denial of a state motion for post-conviction relief based on a matter of state law, where the claim was not timely raised in state court, the ruling does not conflict with any other court opinion or address any unsettled question of federal constitution law, and exercising jurisdiction would require retroactive application of a new rule of constitutional law?

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THE *RING V. ARIZONA* CLAIM WAS NOT PRESENTED TO THE STATE COURTS IN A TIMELY FASHION, AND IS PROCEDURALLY BARRED UNDER FLORIDA LAW.

II. 8

THE *RING* CLAIM WAS CORRECTLY DECIDED BY THE STATE COURT BASED UPON THE APPLICATION OF STATE LAW.

III 9

RING DOES NOT INVALIDATE THE FLORIDA DEATH PENALTY STATUTE, DOES NOT REQUIRE JURY SENTENCING, AND DOES NOT SUPPLY A BASIS FOR REVERSAL OF HERRING'S DEATH SENTENCE.

IV. 15

CERTIORARI REVIEW IS INAPPROPRIATE BECAUSE HERRING SEEKS THE APPLICATION OF A NEW RULE OF CONSTITUTIONAL LAW IN A COLLATERAL PROCEEDING.

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DOCKET NO. 03-1284

IN THE SUPREME COURT OF THE UNITED STATES

TED HERRING,
Petitioner,

v.

JAMES V. CROSBY, SECRETARY,
DEPARTMENT OF CORRECTIONS, FLORIDA
Respondent.

CITATION TO OPINION BELOW

The Florida Supreme Court's decision in Herring's state habeas corpus proceeding is an order issued on December 10, 2003. *Pet. App.* 10a. The Respondents' Answer to the petition for writ of habeas corpus, which raised a state procedural bar to consideration of the claim contained in the petition for writ of certiorari, is attached as Respondent's Appendix A.

STATEMENT OF JURISDICTION

Herring asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondents agree that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but respectfully submits that this case is inappropriate for the exercise of the Court's discretionary jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

In the body of his petition, Herring asserts that the Sixth and Fourteenth Amendments to the Constitution of the United States are at issue in this proceeding. Herring also asserts that §775.082 and § 921.141 of the *Florida Statutes* are at issue. Those provisions of the *Florida Statutes* set out the capital sentencing scheme that has been repeatedly upheld by this Court.

In addition to the foregoing constitutional and statutory provisions which are involved in this case, Herring has also set out the Fifth and Eighth Amendments to the Constitution of the United States in the Appendix to his petition. If inclusion of those authorities is intended to also invoke those Amendments, Respondents respectfully suggest that those provisions have nothing to do with this case. The only issue contained in Herring's petition is based on *Ring v. Arizona,* 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (which are based expressly on the Sixth Amendment) -- Respondents respectfully suggest that the Fifth and Eighth Amendments have nothing to do with this proceeding.

STATEMENT OF THE CASE

On pages 1-5 of the petition, Herring sets out an argumentative and largely irrelevant discussion of the history of this case. The Respondents rely on the following statement of the facts of this case, which is taken from the Florida Supreme Court's 1984 decision in his case:

> Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper distribution man who had arrived at the store called the police. In investigating the crime scene, the police found a note on the counter which read:
>
> > This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot [sic].
>
> A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.
>
> Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He was taken to the Daytona Beach Police Department, where he was advised of his *Miranda* rights. Herring signed a written waiver of his *Miranda* rights and was

interrogated by detectives. During the course of the interrogation, he was asked about several armed robberies, including the May 29 convenience store robbery-murder. A judgment of guilty in one of these other armed robberies was entered against appellant on January 8, 1982. Appellant, in his first statement, which was taped, told the detectives that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over money or be shot. He claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, told the clerk to lie on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk once in the head and once again after the clerk fell to the floor.

Herring testified that this third statement was given only because the police were harassing him. He admitted writing the holdup note, however, and one of the fingerprints on the note was identified as the appellant's. At the conclusion of the guilt phase of the trial, the jury found appellant guilty of armed robbery and first-degree murder.

In the penalty phase of the trial, the state put into evidence a certified copy of the judgment and sentence for the prior unrelated robbery with a firearm, which judgment was entered on January 8, 1982. The state also presented the testimony of a probation and parole officer who had spoken to Herring in June, 1981, concerning the murder. She testified that Herring denied committing the murder but that he also commented that the man "got what he deserved for trying to play hero" and that the victim's death meant "one less cracker."

Appellant's mother testified on his behalf and stated that she and the appellant's father were divorced when the appellant was four years of age; that the appellant was treated for psychological problems and was diagnosed as hyperactive with learning disabilities; and that the appellant, who dropped out of school after completing the fifth grade, has an IQ of eighty. The appellant also attempted to present the testimony of three attorneys who had represented persons charged with first-degree murder who received life sentences after pleading guilty. This testimony was rejected by the trial court. The trial court also rejected the proffer of two poems authored by the appellant which were contained in a clinical report written about him. No testimony was proffered concerning the report, nor was the person who prepared the report called to testify.

By an eight-to-four vote the jury recommended the

> imposition of the death penalty. The trial judge imposed the death penalty, finding four aggravating and two mitigating circumstances. The aggravating circumstances found by the trial judge were: (1) that appellant had previously been convicted of a robbery with a firearm, a felony involving the use or threat of violence to a person; (2) that the murder was committed while appellant was engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial judge found (1) that the appellant had a difficult childhood and had learning disabilities, and (2) that he was nineteen years old at the time of the crime.

Herring v. State, 440 So. 2d 1049, 1051-53 (Fla.), *cert. denied*, 469 U.S. 989 (1984).[1]

Herring has filed various other collateral attack proceedings challenging his conviction and sentence, but the only one relevant to this proceeding is the state petition for writ of habeas corpus he filed in the Florida Supreme Court on or about June 23, 2003. The Florida Supreme Court denied relief on that petition on December 10, 2003. *Pet. App.* 10a.[2] Herring filed his petition for a writ of certiorari on March 8, 2004.

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[1]The Florida Supreme Court subsequently receded from the application of the cold, calculated and premeditated aggravator to the facts of this case. *Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988). That matter is not before this Court.

[2]At this time, Herring has a post-conviction motion pending in the Circuit Court of Volusia County, Florida, as well as an appeal from the denial of his Federal habeas corpus petition pending in the United States Court of Appeals for the Eleventh Circuit. Those proceedings do not implicate the issue contained in this petition.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE *RING V. ARIZONA* CLAIM WAS NOT PRESENTED TO THE STATE COURTS IN A TIMELY FASHION, AND IS PROCEDURALLY BARRED UNDER FLORIDA LAW.

This claim is inappropriate for the exercise of this Court's discretionary jurisdiction because, the *Ring/Apprendi* claim could have been, but was not, timely raised in the state courts. (App. A). This claim has been available since this Court's decision in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), when this Court held that the Constitution does not require jury sentencing. The basis of the *Ring/Apprendi* claim has been available to Herring since the time he was sentenced to death, but was not raised as a basis for relief until his 2003 state habeas corpus petition. Because that is so, this claim is procedurally barred under settled Florida law, and, consequently, has never been properly presented to the State courts for decision.

Because this claim was not timely raised below, it is inappropriate for the exercise of this Court's certiorari jurisdiction. *Adams v. Robertson*, 520 U.S. 83 (1997); *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367 (1996) ("generally [we] do not address arguments that were not the basis for the decision below."); *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392 (1996); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). To the extent that Herring may argue that the Florida Supreme Court's order denying relief does not explicitly rest on State procedural bar grounds, the Respondents suggest that the procedural bar defense was clearly asserted in the answer to the habeas corpus petition, and that this Court should not presume that, by silence, the State Court ignored its own procedural rules. *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). This Court should decline to exercise its certiorari jurisdiction to entertain this claim.

II. THE *RING* CLAIM WAS CORRECTLY DECIDED BY THE STATE COURT BASED UPON THE APPLICATION OF STATE LAW.

The law is well-settled that the State courts are the final arbiters of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (this Court "repeatedly has held that state courts are the ultimate expositors of state law ... and that we are bound by their constructions except in extreme circumstances."). While Herring claims that Florida law is to the contrary (*Petition*, at 8), the Florida Supreme Court has explicitly held that the maximum sentence exposure following conviction of a capital felony is death:

> The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read *in para materia* with section 921.141, *Florida Statutes*, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death.

Mills v. Moore, 786 So. 2d 532, 538 (Fla.), *cert. denied,* 523 U.S. 1015 (2001). The Florida Supreme Court has consistently interpreted Florida's capital sentencing statute in that way, both before and after *Ring* was decided. *See, Shere v. Moore*, 830 So. 2d 56 (Fla. 2002) (holding that a Florida defendant is **eligible** for a death sentence on **conviction** of a capital felony); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070 (2002); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067 (2002). Because that is the law in Florida, Herring's reliance on decisions from other state courts is misplaced -- it does not matter what interpretation another state supreme court has placed on its particular statute because only the Florida Supreme Court can make a binding interpretation of Florida law. There is no conflict between Courts, nor can there be.[3] The

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[3]In his effort to create a "conflict" among courts, Herring points to decisions from Missouri, Colorado, and Nevada. Significantly, he makes no mention of any decisions from Alabama, Indiana, and Delaware, the other three "hybrid" states which this Court grouped with Florida in *Ring*. *Ring*, 536 U.S. at 608, n.6.

Florida Supreme Court correctly decided the *Apprendi/Ring* issue, and this Court should decline to exercise its certiorari jurisdiction. *See, Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n.3 (1987) (cases that have not divided the courts or presented important, unsettled questions of federal law usually do not merit certiorari review).

III. *RING* DOES NOT INVALIDATE THE FLORIDA DEATH PENALTY STATUTE, DOES NOT REQUIRE JURY SENTENCING, AND DOES NOT SUPPLY A BASIS FOR REVERSAL OF HERRING'S DEATH SENTENCE.

Ring v. Arizona did not invalidate the Florida death penalty statute, and does not provide a basis for reversal of Herring's death sentence. In *Apprendi*, this Court announced the rule that "any fact that increases the penalty for a crime beyond the proscribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Ring*, this Court extended *Apprendi* to Arizona's capital sentencing scheme and found that **Arizona's** scheme violated the Sixth Amendment because it allowed a trial judge, sitting without a jury, to find an aggravating circumstance **necessary** for the imposition of the death penalty. *Ring*, 536 U.S. at 609. However, in *Mills v. Moore, supra*, which was decided prior to *Ring*, the Florida Supreme Court did not apply *Apprendi* to Florida's capital sentencing scheme, because, even if *Apprendi* **did** apply to capital sentencing, **the maximum penalty for first degree murder in Florida (unlike Arizona) is death.** *Mills*, 786 So. 2d at 536-38.

Shortly after this Court overturned *Walton v. Arizona*, 497 U.S. 639 (1990) in *Ring v. Arizona*, 536 U.S. 584 (2002), the Florida Supreme Court stayed active death warrants in two capital cases, purportedly to assess the impact of *Ring* to its prior *Mills* decision. On October 24, 2002, the Florida Supreme Court issued opinions in these two cases and upheld Florida's statutory capital scheme against an attack based on *Ring*. See *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002). The Florida

Supreme Court's conclusion that death is the maximum sentence for first degree murder in Florida is not called into question by this Court's *Ring* or *Apprendi* decisions, neither of which overruled prior decisions by this Court rejecting constitutional challenges to Florida's capital sentencing procedures. *See, e.g., Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976).

Herring also argues that *Apprendi* and *Ring* apply to Florida's capital sentencing procedures because, under Florida law, a death sentence may not be imposed unless a trial judge acting independently of the jury makes findings of fact in support of an aggravating factor. *Mills* is the law in Florida, and clearly distinguishes between the death eligibility determination (which is made at the guilt stage proceeding) and the death **selection** stage, which takes place at the penalty stage of a Florida capital trial. In *Mills* and *Shere,* the Florida Supreme Court made it clear that, under Florida law, the defendant is death **eligible** on conviction for first degree murder -- it is during the penalty phase that the sentence determination is made.[4]

Although Petitioner claims that *Ring* applies to Florida, *Ring* is merely the application of the holding in *Apprendi* to Arizona's capital scheme. Clearly, the application of *Apprendi* was limited to factual findings, other than a prior conviction, which **increase** the statutory maximum for a charged offense. Because the Arizona Supreme Court interpreted its state law as prescribing only a life sentence upon conviction for first degree murder, *Ring*, 536 U.S. at 595-96; *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001), *Ring* fits squarely within the *Apprendi* holding, - - *Ring* does not, however, extend or expand the Sixth Amendment right at issue in *Apprendi.*

Although *Ring* applied *Apprendi* to Arizona's capital sentencing law and recognized that *Walton* had misinterpreted Arizona law, it did not cast doubt on the Florida Supreme Court's conclusion (in *Mills* and later cases) that *Apprendi* and *Ring* were not implicated

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[4]Stated in slightly different terms, at the penalty (sentence) stage, the choice is made between death or life imprisonment -- **both** are sentences for which the defendant is **eligible** by virtue of his conviction.

under Florida's death penalty statute.[5] The plain language of *Apprendi* and *Ring* establishes that those cases come into play when a defendant is exposed to a penalty exceeding the maximum allowable under the jury's verdict. The Florida Supreme Court has clearly held that under Florida law death ok the statutory maximum for first degree murder. Because that is so, Herring was death-eligible based upon his **conviction** for first degree murder -- *Ring* is inapplicable to Florida's death sentencing scheme, and does not make Herring's death sentence or Florida's sentencing scheme unconstitutional.

Contrary to Herring's position, *Ring* proves only that the Florida Supreme Court was correct, because *Apprendi* (and more importantly, *Ring*) does not require jury sentencing. As Justice Scalia stated in concurrence (joined by Justice Thomas), this Court's decision in *Ring* **"has nothing to do with jury sentencing."** *Ring*, 536 U.S. at 612 (Scalia, J., concurring) [emphasis added]. *Apprendi* and *Ring* involve the jury's role in determining death eligibility, and, once that determination is made (as it is at the guilt stage by a Florida jury), there is no further constitutional issue because *Apprendi* and *Ring* do not require that a jury perform the actual *selection* of sentence. Relying directly on *Proffitt*, 428 U.S. at 252, *Ring* acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required." *See also Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution permits the trial judge, acting alone, to impose a capital sentence and is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight). *Ring* involves only the requirement that the jury find the defendant death-eligible, and the Florida statute complies with that constitutional mandate. *Ring*, 536 U.S. at 597 n.4. The actual sentencing decision may constitutionally be made by the trial court. *See Spaziano*, 468 U.S. at 459 (finding Sixth Amendment has no guarantee of right to jury trial on issue of sentence).

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[5]The error in *Walton*, which was corrected in *Ring*, was in interpreting the **Arizona** death sentencing statute as making the death eligibility determination at the guilt stage of a capital trial. The Arizona Supreme Court interpreted the statute to the contrary. *Walton* made no error in the interpretation of Florida law, which has always determined death eligibility at the guilt stage.

Aggravating factors in Florida are not elements of the offense, but are capital sentencing guidelines which channel the sentencer's discretion for Eighth Amendment purposes (which have nothing to do with the Sixth Amendment issues driving *Ring* and *Apprendi*). *See Bottoson v. Moore*, 833 So. 2d 693, 729 (Fla. 2002) ("Given the operation of Florida's statutory scheme, aggravating factors should not be considered elements, nor . . . are they the functional equivalent of elements of a greater offense such that *Ring* would require that they be found unanimously by a jury.") (Lewis, J., concurring). Florida's capital sentencing scheme (§921.141, *Florida Statutes*) sets out guidelines for the sentencer to follow in evaluating the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Because a defendant is eligible for the statutory maximum sentence of death upon conviction of first degree murder, further proceedings to evaluate and assess the sentencing selection factors clearly do not violate due process. The sentencer may constitutionally be given discretion in determining the appropriate sentence (which, in the case of a capital conviction, is either life or death) so long as the jury has decided that the defendant is eligible for the death penalty. That is what Florida law provides, and, therefore, *Ring* and *Apprendi* have no impact on the constitutionality of Florida's sentencing statute.

Apprendi and *Ring* hold that any fact that increases the penalty **beyond** the statutory maximum must be determined by the jury -- however, since the Florida Supreme Court has clearly held that death is the maximum punishment for first degree murder, the penalty (or sentence exposure) is not increased by the subsequent finding of aggravators. The aggravators are constitutionally mandated guidelines (or sentence selection criteria) which exist to satisfy the Eighth Amendment and protect against capricious and arbitrary sentences -- they are not elements of the crime, and they have nothing to do with the *Apprendi/Ring* analysis.

To the extent that it is relevant, the Florida Supreme Court has held that the jury's advisory sentence need not be unanimous. *See Way v. State*, 760 So. 2d 903, 924 (Fla. 2000) (Pariente, J., concurring) (noting jury's death recommendation need not be unanimous);

Thompson v. State, 648 So. 2d 692, 698 (Fla. 1984) (holding simple majority vote of death is constitutional); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975) (same). The issuance of *Apprendi* and *Ring* has not changed anything. *Card v. State*, 803 So. 2d 613, 628 n.13 (Fla. 2001) (rejecting claim that *Apprendi* requires unanimous jury recommendation; "capital jury may recommend a death sentence by a bare majority vote"); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001) (same); *Looney v. State*, 803 So. 2d 656, 675 (Fla. 2001) (same); *Brown v. Moore*, 800 So. 2d 223 (Fla. 2001) (rejecting argument that aggravators must be found by unanimous jury).[6]

Finally, *Ring* did not overrule the numerous cases where this Court upheld Florida's capital sentencing against constitutional challenges. *See Hildwin*, 490 U.S. at 640-41 (stating that case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury"); *Proffitt*, 428 U.S. at 252 (holding Constitution does not require jury sentencing); *Spaziano* , 468 U.S. at 459 (same). This Court has clearly stated, "[w]e reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Neither *Apprendi* nor *Ring* has implicitly overruled the above cases which have repeatedly upheld Florida's death penalty act.

The Florida Supreme Court's opinions in *Bottoson* and *King* recognize and respect the position that this Court has the prerogative of overruling its own decisions. Although each of the Florida

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[6]Of course, unanimity requirements with respect to mitigating factors has been rejected by this Court. *McKoy v. North Carolina*, 494 U.S. 433 (1990) (determining that requirement of unanimous findings of mitigators is unconstitutional); *Mills v. Maryland*, 486 U.S. 367 (1988) (same).

Supreme Court's justices wrote separate concurring opinions in *Bottoson* and *King*, the court unanimously determined that *Ring* did not entitle the defendants to relief. The Florida Supreme Court has continuously followed this precedent and denied relief based on *Ring*. *See Robinson v. State & Crosby*, 865 So. 2d 1259 (Fla. 2004), *cert. denied*, 124 S.Ct. 1197 (2004); *Parker v. State*, 29 Fla. L. Weekly S27 (Fla. Jan 22, 2004); *Davis v. State*, 28 Fla. L. Weekly S835 (Fla. Nov. 20, 2003); *Guzman v. State*, 28 Fla. L. Weekly S829 (Fla. Nov. 20, 2003); *Zakrzewski v. State*, 866 So. 2d 688 (Fla. 2003); *Johnston v. State*, 863 So. 2d 271 (Fla. 2003), *cert. denied*, 2004 WL 180326 (U.S. Mar. 22, 2004); *Cummings-El v. State/Crosby*, 863 So. 2d 246 (Fla. 2003); *Anderson v. State*, 863 So. 2d 169 (Fla. 2003), *cert. denied*, 2004 WL 547148 (U.S. Mar. 22, 2004); *Owen v. State*, 862 So. 2d 687 (Fla. 2003), *Petition for cert. filed*, Case. No. 03-9345, (U.S. Mar. 4, 2004); *Henry v. State*, 862 So. 2d 679 (Fla. 2003); *Rivera v. State/Crosby*, 859 So. 2d 495 (Fla. 2003); *Davis v. State*, 859 So. 2d 465 (Fla. 2003); *Marquard v. State*, 850 So. 2d 417, 431 n.12 (Fla. 2002); *Lugo v. State*, 845 So. 2d 74, 119 (Fla.), *cert. denied*, 124 S.Ct. 320 (2003); *Kormondy v. State*, 845 So. 2d 41 (Fla.), *cert. denied*, 124 S.Ct. 392 (2003); *Spencer v. State/Crosby*, 842 So. 2d 52 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla.), *cert. denied*, 124 S.Ct. 408 (2003); *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002); *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002), *cert. denied*, 124 S.Ct. 100 (2003); *Doorbal v. State*, 837 So. 2d 940 (Fla.), *cert. denied*, 123 S.Ct 2647 (2003); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 123 S.Ct. 662 (2002); *Chavez v. State*, 832 So. 2d 730 (Fla. 2002), *cert. denied*, 123 S.Ct. 2617 (2003); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 123 S.Ct. 657 (2002).

Herring became eligible for the death penalty upon his conviction for first degree murder, and the jury determined that the appropriate sentence was death upon consideration of sentencing selection factors. Petitioner cannot demonstrate that Florida law is constitutionally inadequate under existing precedent. Finally, even if this Court were to recede from all its previous Sixth and Eighth Amendment decisions upholding Florida's capital sentencing procedures, Herring is not entitled to relief under *Ring* as he has previously been convicted of another violent felony (robbery with a

firearm) in addition to being convicted of the robbery during which the murder occurred (thereby establishing the murder during the course of an enumerated felony aggravator) -- those aggravators clearly fall outside the scope of *Apprendi/Ring*. This Court should deny the petition for writ of certiorari.

IV. CERTIORARI REVIEW IS INAPPROPRIATE BECAUSE HERRING SEEKS THE APPLICATION OF A NEW RULE OF CONSTITUTIONAL LAW IN A COLLATERAL PROCEEDING.

Finally, this Court should decline to exercise its discretionary jurisdiction because Herring is seeking retroactive application of a new rule of constitutional law to his conviction and sentence, which have been final since 1984. In *Teague v. Lane*, 489 U.S. 288, 298 (1989), this Court noted that retroactivity is "properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Herring fails to address the threshold question of the retroactive application of *Ring* to his conviction and sentence. Instead, Herring asserts that this "Court need not address retroactivity in considering the petition" because the state habeas corpus petition "was governed by the test for determining retroactivity under Florida law." *Petition*, at 17. That argument confuses the nature of this proceeding and the standard by which this Court decides the retroactivity question.[7]

Neither this Court nor the Florida Supreme Court has directly

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[7]Herring's plea to be allowed to litigate the retroactivity issue in state court under the *Witt v. State*, 387 So. 2d 922 (Fla. 1980), standard ignores and devalues this Court's role. This Court decides retroactivity questions based on *Teague*, and, given that the State court proceeding is final for all purposes, Herring cannot "reopen" the retroactivity issue in state court.

addressed retroactivity of either *Ring*[8] or *Apprendi*[9]; however, the Texas Court of Criminal Appeals recently held *Ring* is not retroactive. *Ex parte Briseno*, 2004 Tex.Crim.App. LEXIS 199 (Feb. 11, 2004). The two federal circuit courts of appeal that have directly addressed whether *Ring* may be retroactively applied, in terms relevant here, have split on this issue.[10] In *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), the Eleventh Circuit Court of Appeals, in reviewing a Florida conviction and death sentence, ruled that Turner could not collaterally attack his convictions and sentences on the basis of a *Ring* error because *Ring* did not apply retroactively. Shortly after the *Turner* decision issued, a different panel of the Eleventh Circuit ruled in *Ziegler v. Crosby*, 345 F.3d 1300 (11th Cir. 2003), that Zeigler's challenge to his Florida death sentence fails because neither *Apprendi* nor *Ring* applies retroactively on collateral review to convictions that became final before these cases were decided.

In *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 833 (Dec. 1, 2003), the Ninth Circuit, in reviewing Arizona's capital sentencing structure, came to the opposite conclusion. Significantly, the Ninth Circuit's decision turned on its

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[8]Justice O'Connor in her dissent in *Ring* implied that *Ring* was not retroactive as she noted that capital defendants will be barred from taking advantage of the court's holding on federal collateral review. *Ring*, 536 U.S. 584, 621 (2002) (O'Connor, J., dissenting).

[9]This Court has held, however, that an *Apprendi* error is not plain error because failing to include the quantity of drugs in an indictment, while an *Apprendi* violation, did not affect the fairness, integrity or public reputation of judicial proceedings. *United States v. Cotton*, 535 U.S. 625 (2002). If a found error is not of such magnitude as to constitute plain error, it follows that it is not of such fundamental significance as to warrant retroactivity. In *Harris v. United States*, 536 U.S. 545 (2002), Justice Thomas observed in his dissenting opinion that "[n]o Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive effect." *Harris*, 536 U.S. at 581. All eleven federal circuit courts of appeal have ruled that *Apprendi* is not to be retroactively applied.

[10]While other federal circuit courts of appeal have addressed *Ring's* retroactivity in terms of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as applied to successive habeas corpus petitions, only two have directly addressed *Ring's* retroactivity in terms relevant here and in light of this Court's general retroactivity analysis as set forth in *Teague v. Lane*, 489 U.S. 288 (1989).

conclusion that the retroactive application of *Ring* was necessary to ensure the fairness of Arizona's capital sentencing scheme. In fact, the Court went so far as to conclude that application of *Ring* was necessary to "significantly improve the accuracy of capital trials in Arizona." *Summerlin*, 341 F.3d at 1115.

This is not the case, however, in Florida. In *Turner*, the Eleventh Circuit observed that Florida's pre-*Ring* capital sentencing procedure "does not diminish the likelihood of a fair sentencing hearing." The Court went on to note that "*Ring* is based on the Sixth Amendment right to a jury trial, not on a perceived, much less documented need to enhance accuracy or fairness of the fact-finding in a capital sentencing context." *Turner*, 339 F.3d at 1286.[11] This Court has also refused to apply a Sixth Amendment right to jury trial retroactively when it could not be said that the fact-finding process is more fair or reliable when done by a jury rather than by a judge. *DeStefano v. Woods*, 392 U.S. 631 (1968).

Herring became eligible for the death penalty upon his conviction for first degree murder -- the jury determined that the appropriate sentence was death upon consideration of sentencing selection factors. The jury further determined unanimously that he was guilty of armed robbery, a factor which was determined to be an aggravating factor. Herring cannot demonstrate that Florida law is constitutionally inadequate under existing precedent. Even if this Court were to recede from all its previous Sixth and Eighth Amendment decisions upholding Florida's capital sentencing procedures, any error would be harmless in this case. Because certiorari review will not have any impact on the outcome of this case, this Court should deny Herring's petition.

Herring has failed to demonstrate that there are special or important reasons compelling certiorari review of his case -- the petition should be denied.

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[11]This ruling is consistent with this Court's observation in *Ring* that the right to a jury trial did not "turn on the relative rationality, fairness, or efficiency of potential factfinders." *Ring*, 536 U.S. at 607.

CONCLUSION

Based upon the foregoing arguments and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,

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DOCKET NO. 03-1284

IN THE SUPREME COURT OF THE UNITED STATES

TED HERRING,
Petitioner,

v.

JAMES V. CROSBY, SECRETARY,
DEPARTMENT OF CORRECTIONS, FLORIDA
Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF FLORIDA

TED HERRING,
Petitioner,

Case No. SC03-1144

v.

JAMES V. CROSBY, JR.,
Secretary, Department
of Corrections, *et.al*,
Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COME NOW the Respondents, by and through the undersigned counsel, and respond as follows to Herring's petition for writ of habeas corpus. For the reasons set out herein, the petition should be denied in all respects -- likewise, there is no justification for oral argument in this case, and it should not be allowed.

RESPONSE TO JURISDICTION

Respondents agree that this Court has jurisdiction, under the *Rules of Appellate Procedure*, to entertain petitions for writs of habeas corpus.

RESPONSE TO "STATEMENT OF FACTS"

The "statement of facts" set out on pages 2-4 of the petition contains few facts relevant to the crimes for which Herring was convicted and sentenced to death, and, moreover, contains an argumentative dissertation on the shortcomings of Herring's 1985 *Florida Rule of Criminal Procedure* 3.850 proceeding. That case has been final for years, and may not be relitigated in this petition for writ of habeas corpus.

The State relies on the following facts, as found by this Court in affirming Herring's convictions and sentence:

The appellant, Ted Herring, was convicted of armed robbery and the first-degree murder of a convenience store clerk. In accordance with the jury's advisory recommendation, the trial judge imposed the death sentence. We have jurisdiction, [footnote omitted] and affirm the conviction and sentence of death.

The following are the relevant facts. Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper distribution man who had arrived at the store called the police. In investigating the crime scene, the police found a note on the counter which read:

> This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot [sic].

A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.

Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He was taken to the Daytona Beach Police Department, where he was advised of his *Miranda* rights. Herring signed a written waiver of his *Miranda* rights and was

interrogated by detectives. During the course of the interrogation, he was asked about several armed robberies, including the May 29 convenience store robbery-murder. A judgment of guilty in one of these other armed robberies was entered against appellant on January 8, 1982. Appellant, in his first statement, which was taped, told the detectives that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over money or be shot. He claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, told the clerk to lie on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk once in the head and once again after the clerk fell to the floor. Herring testified that this third statement was given only because the police were harassing him. He

admitted writing the holdup note, however, and one of the fingerprints on the note was identified as the appellant's. At the conclusion of the guilt phase of the trial, the jury found appellant guilty of armed robbery and first-degree murder.

In the penalty phase of the trial, the state put into evidence a certified copy of the judgment and sentence for the prior unrelated robbery with a firearm, which judgment was entered on January 8, 1982. The state also presented the testimony of a probation and parole officer who had spoken to Herring in June, 1981, concerning the murder. She testified that Herring denied committing the murder but that he also commented that the man "got what he deserved for trying to play hero" and that the victim's death meant "one less cracker."

Appellant's mother testified on his behalf and stated that she and the appellant's father were divorced when the appellant was four years of age; that the appellant was treated for psychological problems and was diagnosed as hyperactive with learning disabilities; and that the appellant, who dropped out of school after completing the fifth grade, has an IQ of eighty. The appellant also attempted to present the testimony of three attorneys who had represented persons charged with first-degree murder who received life sentences after pleading guilty. This testimony was rejected by the trial court. The trial court also rejected the proffer of two poems authored by the appellant which were contained in a clinical report written about him. No testimony was proffered concerning the report, nor was the person who prepared the report called to testify.

By an eight-to-four vote the jury recommended the imposition of the death penalty. The trial judge imposed the death penalty, finding four aggravating

> and two mitigating circumstances. The aggravating circumstances found by the trial judge were: **(1) that appellant had previously been convicted of a robbery with a firearm, a felony involving the use or threat of violence to a person; (2) that the murder was committed while appellant was engaged in the commission of a robbery;** (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial judge found (1) that the appellant had a difficult childhood and had learning disabilities, and (2) that he was nineteen years old at the time of the crime.

Herring v. State, 446 So. 2d 1049, 1051-53 (Fla. 1984). [emphasis added].[1] To the extent that Herring attempts, in footnote 1, to "incorporate by reference" everything that has previously been filed over the 20-year history of this case, that procedure, as attractive as it may be to Herring, is not available. It is axiomatic that the purpose of an appellate brief is to present legal authority in support of the party's position, not to "incorporate by reference" the entire record and expect this Court and the State to decipher what the opposing party's claims really are.

RESPONSE TO NATURE OF RELIEF SOUGHT

Herring is not entitled to relief based upon the *Apprendi/Ring* claim contained in the petition.

RESPONSE TO POST-CONVICTION PROCEDURAL HISTORY

The post-conviction procedural history set out on pages 4-11 of the petition is substantially correct. Since Herring filed this petition

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[1]On page 3, Herring improperly attempts to relitigate the "non-statutory aggravator" claim that was found procedurally barred in this Court's 1986 decision in this case. *Herring v. State,* 501 So. 2d, 1279 (Fla. 1986).

on June 23, 2003, he has filed an application for a certificate of appealability from the denial of his federal habeas corpus petition with the Eleventh Circuit Court of Appeals. On August 21, 2003, the Eleventh Circuit granted the certificate as to three claims.

On August 18, 2003, a case management conference was conducted by the Volusia County Circuit Court in Herring's successive Rule 3.851 motion in which he alleged that *Atkins v. Virginia,* 536 U.S. 304 (2002), prevents the State from carrying out his death sentence. The Circuit Court ruled that an evidentiary hearing will be conducted on the *Atkins* claim, and, at this juncture, it appears likely that the hearing will be scheduled for November 2003.

RESPONSE TO GROUNDS FOR RELIEF

I. THE *RING V. ARIZONA* DECISION DOES NOT AFFECT FLORIDA DEATH PENALTY LAW[2]

PRELIMINARY MATTERS

Herring claims that the United States Supreme Court's *Ring v. Arizona*, 536 U.S. 584 (2002), decision invalidates Florida's long-upheld capital sentencing structure. There are three fundamental reasons why the *Apprendi/Ring* argument fails: that claim is procedurally barred; Herring's death sentence is supported by aggravators that fall outside any interpretation of *Apprendi/Ring*; and, the statute under which Herring was sentenced to death provides that, upon **conviction** for capital murder, the maximum possible sentence is **death**, unlike the statute at issue in *Ring*.

It is true that *Ring* clarified the applicability of *Apprendi* to capital cases and partially overruled *Walton v. Arizona,* 497 U.S. 639 (1990). However, *Walton* had been decided based on a misunderstanding by the United States Supreme Court of Arizona

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[2] **Herring makes this claim despite the complete dissimilarity of the Florida and Arizona statutes, and despite the fact that no decisions of the United States Supreme Court upholding the constitutionality of the Florida death penalty statutes were invalidated, criticized, or otherwise called into question in *Ring*.**

death penalty law, a pivotal fact that is conspicuously absent from Herring's habeas petition.[3] The fundamental issue in *Ring*, and the rationale behind the result, clearly rests on the United States Supreme Court's **misinterpretation** of **Arizona's** capital sentencing statute. *Ring* at 603-5. However, *Ring* has no application to Florida's death sentencing scheme because the Court did **not** misinterpret **Florida** law. Herring's claim that Florida's statute fails because *Walton* has been overruled is predicated upon the false (and demonstrably incorrect) assertion that Florida and Arizona have functionally identical capital sentencing statutes. A cursory reading of *Ring* demonstrates that that is simply not true. Even ignoring the clear procedural bars and the total legal inapplicability of *Ring* to the facts of this case, the basic difference between Arizona and Florida law is dispositive of Herring's claims.

A. THE *RING* CLAIM IS NOT AVAILABLE TO HERRING BECAUSE IT IS PROCEDURALLY BARRED AND BECAUSE IT IS NOT RETROACTIVE TO HIS CASE

1. The *Apprendi/Ring* claim is procedurally barred.

Herring's reliance on *Ring* to support a Sixth Amendment claim is procedurally barred because it could have been but was not raised at trial and on direct appeal. The issue in *Ring* (which is merely an extension of *Apprendi*, anyway) is by no means new or novel -- that claim, or a variation of it, has been known since before the United States Supreme Court's 1976 decision in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (holding that the Constitution does not require jury sentencing). The "basis" for a claim that the sentence imposed in this case violated Herring's right to a jury trial has been available since he

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[3] The *Ring* Court determined that *Apprendi* and its impact on the prior decision in *Walton* required clarification (or correction of the Court's understanding) of the role of the jury in **Arizona** capital sentencing. Nothing in that decision changed the dynamic of Florida's capital sentencing scheme under *Apprendi* and *Ring*.

was sentenced to death -- he raised this claim after *Apprendi*[4] was decided, as did other Florida death row inmates, who have been raising the same claim since well prior to *Ring*. *See, Mills, infra.* There is nothing magical about an *Apprendi* claim, and, despite the pretensions of Herring's brief, *Ring* is nothing more than the application of *Apprendi* to capital cases. There is no justification for a departure by this Court from application of the well-settled State procedural bar rules, which this Court reaffirmed in *F.B. v. State*, 28 Fla. L. Weekly S624 (Fla., July 11, 2003).[5] The *Apprendi* claim is procedurally barred, and all relief should be denied on that basis. *See, e.g., Bundy v. State,* 538 So. 2d 445 (Fla. 1985).

2. The aggravators in Herring's case fall outside the scope of *Apprendi/Ring*, and reliance on those decisions is misplaced.

In addition to being procedurally barred, *Apprendi/Ring* does not provide a basis for relief in this case because the rule of law set out in those cases is inapplicable to the facts of Herring's case. The prior violent felony aggravator and the during the course of a robbery aggravator, both of which are clearly applicable, fall outside of any conceivable interpretation of *Apprendi/Ring.*

Under the plain language of *Apprendi*, a prior violent felony conviction (which in this case was a prior robbery with a firearm conviction) is a fact which may be a basis to impose a sentence **higher than that authorized by the jury's verdict** without the need for

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[4] *Apprendi v. New Jersey,* 530 U.S. 466 (2000), was released on June 26, 2000. Any claims based on that case are untimely because they were not raised until more than two years after *Apprendi* was released. Rule 3.851(d), *Fla. R. Crim. P.*

[5] In *F.B. v. State*, this Court was explicit in holding that the only exception to the contemporaneous objection rule (which Herring clearly did not follow) is when the error is fundamental, which an *Apprendi/Ring* claim is not. In this case, there is no error at all under *Apprendi/Ring*, and, because that is so, the contemporaneous objection rule applies and should be enforced by this Court.

additional jury findings.[6] There is no constitutional violation (nor can there be) because the prior conviction constitutes a jury finding which the judge may rely upon, without additional jury findings, in imposing sentence. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under any view of the law, and even after *Ring*, the jury is not required to make a determination of the prior violent felony aggravator, and that aggravating circumstance can be found by the judge alone.

Under any interpretation of the facts, the "prior violent felony conviction" aggravator and the "during the commission of a felony" aggravator (which is supported by the contemporaneous armed robbery conviction) obviate any possible Sixth Amendment error. These two aggravating circumstances are outside of the *Apprendi/Ring* holding,[7] and, because that is so, those decisions are of no help to Herring. Herring's claim has no legal basis because *Apprendi/Ring* is inapplicable to the facts of this case as well as because a Florida **conviction** for murder made capital establishes that defendant's **eligibility** for a death sentence. Herring's attempt to bring his case under the *Apprendi/Ring* umbrella is an attempt to force the square peg of Florida's death penalty statute into the round hole of *Ring*. No relief is justified.

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[6] Of course, under Florida law, death is the maximum possible sentence for the crime of first degree murder, and that is the defendant's sentence exposure upon conviction. See Section B, *infra*. The "higher than authorized by the jury" component of *Apprendi* is not applicable to the capital sentencing process in Florida, but that distinction does not affect the basic premise that a prior felony conviction is a fact that has **already** been found by a jury beyond a reasonable doubt, and does not need to be (and as a policy matter should not be) "re-proven."

[7] The *Apprendi* Court cited to *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), for the proposition that under the Fifth and Sixth Amendments, "any fact **(other than prior conviction)** that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). [emphasis added]. The Court has already clearly said that death is the maximum penalty for first degree murder, so that component of the statement has no application to Florida law. In any event, Herring's prior violent felony conviction, and the murder during a robbery aggravator, are outside any possible (or reasonable) interpretation of *Apprendi* and *Ring*.

3. *Ring* is not retroactive to Herring's case.

In addition to being procedurally barred as well as legally and factually inapplicable, no court to consider the issue[8] has held ***Apprendi*** to be retroactive, and *Ring* is "simply an extension of *Apprendi* to the death penalty context." *Cannon v. Mullin*, 297 F. 3d 989 (10th Cir. 2002), *cert. and stay of execution denied,* 536 U.S. 974 (U.S. July 23, 2002)[9]; *In re Johnson,* 334 F. 3d 403 (5th Cir. 2003) ("Since the rule in *Ring* is essentially an application of *Apprendi*, logical consistency suggests that the rule announced in *Ring* is not retroactively available."). The First and Fourth District Courts of Appeal have held that *Apprendi* is not retroactive, as has the Kansas Supreme Court.[10] *Figarola v. State*, 841 So. 2d 576 (Fla. 4th DCA

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[8] *Coleman v. United States,* 329 F.3d 77 (2nd Cir. 2003); *Goode v. United States,* 305 F.3d 378, 382-85 (6th Cir. 2002); *United States v. Brown,* 305 F.3d 304, 307-10 (5th. Cir. 2002); *United States v. Wiseman,* 297 F.3d 975, (10th Cir. 2002); *United States v. Dowdy,* 2002 U.S. App. LEXIS 12559 (9th Cir. June 20, 2002); *Curtis v. United States*, 294 F.3d 841, 843-44 (7th Cir. 2002); *United States v. Mora,* 293 F.3d 1213, 1218-19 (10th Cir. 2002); *Hines v. United States,* 282 F.3d 1002 (8th Cir. 2002); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir. 2002); *In re Turner*, 267 F.3d 225, 227 (3rd Cir. 2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001); *Forbes v. United States,* 262 F.3d 143, 144 (2nd Cir. 2001); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *Sanders v. United States,* 247 F.3d 139, 151 (4th Cir. 2001); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2001); *Sustache-Rivera v. United States*, 221 F.3d 8, 15 n.12 (1st Cir. 2000).

[9] The *Cannon* Court held, post-*Ring*, that under *Tyler v. Cain*, 533 U.S. 656, 661 (2001) "'under this provision, the Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower courts or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.'"

[10] The Alabama Court of Criminal Appeals has held that *Apprendi* is not retroactive to collateral review cases. *See, Poole v. State*, 2001 WL 996300 (Ala. Crim. App. 2001). The Minnesota Court of Appeals refused to apply *Apprendi* retroactively, holding that it was not a watershed rule of criminal procedure, and that the rule did nothing to enhance the accuracy of a criminal conviction. *Meemken v. State*, 2003 Minn. App. LEXIS 661 (June 3, 2003). The Missouri Supreme Court seems to be the only court that has held that *Ring* is retroactively applicable. *State v. Whitfield*, 2003 Mo. LEXIS 105 (Mo. S.Ct. June 17, 2003). The retroactive application of *Ring* is inconsistent and irreconcilable with the same Court's holding that *Apprendi* is **not** retroactive. *State ex. rel. Nixon v. Sprick*, 59 S.W. 3d 515 (Mo.

2003); *Hughes v. State*, 826 So. 2d 1070 (Fla. 1st DCA 2002) (certifying question); *Whisler v. State*, 36 P.3d 290 (Kan. 2001).[11] The United States Supreme Court has previously held that a violation of the right to a jury trial is not retroactive, *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), and, because that is the law, it is wholly illogical to claim that a wholly procedural ruling like *Apprendi* or *Ring* would be treated differently. It is the prerogative of the United States Supreme Court to make the retroactivity determination -- that Court has not held *Apprendi* or *Ring* retroactive, and has refused to review cases declining to apply those decisions in that fashion. *Cannon, supra. Ring*, like *Apprendi*, is merely a procedural ruling which falls far short of being of "fundamental significance." Finally, the Eleventh Circuit Court of Appeals has expressly held, in a Florida death penalty case, that *Ring* is **not** retroactively applicable. *Turner v. Crosby*, 16 Fla. L. Weekly Fed C926 (11th Cir. July 29, 2003). This Court should not hold otherwise.

Moreover, the *Ring* decision is not retroactively applicable under *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Under *Witt*, *Ring* is not retroactively applicable **unless** it is a decision of fundamental significance, which so drastically alters the underpinnings of Herring's death sentence that "obvious injustice" exists. *New v. State,* 807 So. 2d 52 (Fla. 2001), *cert. denied,* 536 U.S. 942 (2002). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Neither *Apprendi* nor *Ring*

2001). The conflicting results reached by the Missouri Supreme Court suggest that reliance on *Whitfield* would be ill-advised. The Nebraska Supreme Court has held that *Ring* is not retroactively applicable. *State v. Lotter*, 2003 Neb. LEXIS 111 (July 11, 2003).

[11] An *Apprendi* claim is not "plain error,"either. *United States v. Cotton*, 535 U.S. 625 (2002)(indictment's failure to include the quantity of drugs was an *Apprendi* error but did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error for direct appeal purposes, it is not of sufficient importance to be retroactively applicable to collateral proceedings.

meet that standard, either.

4. *The Apprendi/Ring* claim is meritless.

Finally, without waiving the foregoing procedural defenses, the claim raised by Herring has been expressly rejected by this Court. *See McCoy v. State*, 2003 WL 21982066 (Fla. Aug. 21, 2003); *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003), *petition for cert. filed*, July 28, 2003, No. 03-5620; *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003)("*Ring* does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."), *petition for cert. filed*, July 28, 2003, No. 03-5621; *Conahan v. State*, 844 So. 2d 629 (Fla. 2003), *petition for cert. filed*, July 3, 2003, No. 03-5209; *Butler v. State*, 842 So. 2d 817 (Fla. 2003)(relying on *Bottoson v. Moore*, 833 So. 2d 693 and *King v. Moore*, 831 So. 2d 143 to a *Ring* claim in a single aggravator (HAC) case); *Banks v. State*, 842 So. 2d 788 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); *Grim v. State*, 841 So. 2d 455 (Fla. 2003), *petition for cert filed*, June 12, 2003, No. 03-5160; *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla. 2003), *petition for cert. filed*, August 8, 2003, No. 03-5860; *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003)("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other *Apprendi* arguments."); *Fotopoulos v. State/Moore*, 838 So. 2d 1122 (Fla. 2003); *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002), *petition for cert. filed*, May 9, 2003, No. 02-10848; *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003), *petition for cert. filed*, April 24, 2003, No. 02-10379; *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 123 S.Ct. 662 (2002); *Chavez v. State*, 832 So. 2d 730, 767 (Fla. 2002), *cert. denied*, 123 S.Ct. 2617 (2003); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 123 S.Ct. 657 (2002); *Pace v. State/Crosby*, 28 Fla. L. Weekly S415 (Fla. May 22, 2003); *Jones v. State/Crosby*, 28 Fla. L. Weekly S395 (Fla. May 8, 2003); *Marquard v. State/Moore*, 28 Fla. L. Weekly S389, 27 Fla. L. Weekly S973, 978, n. 12 (Fla. Nov. 21, 2002); *Chandler v. State*, 848 So. 2d 1031, 1034 n.4 (Fla. 2003); *Lawrence v. State*, 846 So. 2d 440 (Fla. 2003), *petition for cert. filed*, July 30, 2003, No. 03-5708. This Court should, in addition to denying relief on

procedural grounds, continue to follow this unbroken line of authority by denying relief on the merits as an alternative and secondary basis for the denial of relief.

B. ARIZONA CAPITAL SENTENCING LAW IS DIFFERENT FROM FLORIDA'S, AS THIS COURT HAS HELD.[12]

The Arizona statute at issue in *Ring* is different from Florida's death sentencing statutes. The United States Supreme Court failed to recognize that distinction in *Walton*, but recognized and corrected its misinterpretation of Arizona law in *Ring*. Because *Walton* was based on an incorrect interpretation of Arizona law, the suggestion that Florida's statute is invalid because *Walton* has been overruled is spurious. Since *Ring* corrected the Court's error as to Arizona law, no good faith argument can be made that Florida's statute is anything like Arizona's, especially in light of **this** Court's clear interpretation of Florida law (which is clearly not like Arizona law). The *Ring* Court stated:

> **Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.** *See* 200 Ariz., at 279, 25 P.3d, at 1151 (*citing Ariz. Rev. Stat.* § 13- 703). This was so because, in Arizona, a "death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt." 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13- 703). The question presented is whether **that** aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, [FN3] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury. [FN4]

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[12] In *Mills v. Moore, infra,* the Florida Supreme Court discussed the operation of the Florida death sentencing statute, and explained how our statute is unlike Arizona's.

FN3. "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ...."

FN4. Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority

> to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. *See Apprendi*, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

Ring v. Arizona, 536 U.S. at 597. [emphasis added]. Under Arizona law, the determination of death **eligibility** takes place during the **penalty phase** proceedings, and requires the determination that an aggravating factor exists. Florida law is different.[13]

1. In Florida, death is the maximum sentence for capital murder.

"[T]he legislature, and not the judiciary determines maximum and minimum penalties for violations of the law." *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981). This Court, long before *Apprendi*,[14] concluded that the maximum sentence to which a Florida capital

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[13] The claim that the indictment must contain the aggravators and that the jury must find them unanimously has been repeatedly rejected by this Court. *See, Vining v. State,* 637 So. 2d 921, 927 (Fla. 1994); *Fotopoulos v. State,* 608 So. 2d 784, 794 n.7 (Fla. 1992); *Lightbourne v. State,* 438 So. 2d 380 (Fla. 1983). Aggravators must, of course, be proven beyond a reasonable doubt.

[14] This Court's interpretation of Florida law is consistent with the description of Florida's capital sentencing scheme set out in *Proffitt v. Florida,* and echoed in *Barclay v. Florida,* 463 U.S. 939, 952 (1983) ("[I]f a defendant is found guilty of a **capital** offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence."). **If the defendant were not eligible for a death sentence, there would be no second proceeding.**

defendant is subject following conviction for capital murder is death.[15] *Apprendi* led to no change of any sort, by either the Legislature or this Court.[16]

2. Death eligibility in Florida is determined at the guilt stage.

In Florida, the determination of "**death-eligibility**" is made at the **guilt** phase of a capital trial, **not** at the penalty phase, as is the Arizona practice. This Court has unequivocally said what Florida's law is, just as the Arizona Supreme Court did. The difference between the two states' capital murder statutes is clear, and controls the resolution of the claim. Because death is the maximum penalty for first-degree murder in Florida (**and because it is not in Arizona**), Herring's *Apprendi/Ring* claim collapses because nothing triggers the *Apprendi* protections in the first place. *See, Barnes v. State,* 794 So. 2d 590 (Fla. 2001) (*Apprendi* not applicable when judicial findings did not increase maximum allowable sentence).

Nothing that takes place at the penalty phase of a Florida capital trial **increases** the authorized punishment for the offense of capital murder -- the penalty phase proceeding (which **includes** the jury) is the **selection** phase, which **follows** the eligibility determination, and which does not implicate the *Apprendi/Ring* issue. The state law issue which led to the constitutional violation in Arizona's capital sentencing statute has already been decided differently by this Court, and that decision (in *Mills* and the cases relying on it) differentiates and distinguishes Arizona's system from

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[15] "**The maximum possible penalty described in the capital sentencing scheme is clearly death.**" *Mills, supra. See, e.g., Lightbourne v. State,* 438 So. 2d 380, 385 (Fla. 1983); *Sireci v. State,* 399 So. 2d 964 (Fla. 1981); *Mills v. Moore,* 786 So. 2d 532, 537-8 (Fla. 2001); *Porter v. Moore,* 28 Fla. L. Weekly S33 (Fla. June 20, 2002); *Sweet v. Moore,* 822 So. 2d 1269 (Fla. 2002).

[16] Whatever criticisms Herring may direct against the *Mills* decision cannot alter the fundamental fact that this Court's explanation of Florida's capital sentencing statutes has not changed. By correctly stating that *Apprendi* excluded capital cases, this Court did not ignore its responsibility in applying the applicable cases under Florida law as they applied to the statute.

Florida's constitutional capital sentencing statute.

Section 782.04 of the *Florida Statutes* defines capital murder, and Section 775.082 establishes that the maximum penalty for capital murder is death, in clear contrast to the Arizona statute, which does not. **Arizona, unlike Florida, does not define any offenses as "capital" in its criminal statutes.** There is no constitutional defect with Florida's statute.

3. *Ring* has no impact in Florida, and the decisions upholding the constitutionality of Florida law remain undisturbed.

Ring did not disturb any prior United States Supreme Court decisions upholding the constitutionality of Florida's death penalty scheme, including *Proffitt, supra, Spaziano v. Florida*, 468 U.S. 447 (1984), *Hildwin v. Florida*, 490 U.S. 638 (1989), *Barclay v. Florida,* 463 U.S. 939 (1983), and *Dobbert v. Florida,* 432 U.S. 282 (1977). And, as **this** Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." *Mills v. Moore,* 786 So. 2d 532, 537(Fla. 2001).[17]

The United States Supreme Court did not disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Herring's claims. The Court had every opportunity to directly address *Apprendi/Ring* in the context of Florida's capital sentencing scheme, and expressly declined to do so. *Cf. Hodges v. Florida*, 506 U.S. 803 (1992), wherein the United States Supreme Court vacated the Florida Supreme Court's opinion for further consideration in light of *Espinosa v.*

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[17] To rule in Herring's favor, this Court would have to overrule the five cases cited above, as well as *Clemons, infra, Cabana v. Bullock,* 474 U.S. 376 (1986), *Blystone v. California*, 494 U.S. 299, 306-7 (1990), *Harris v. Alabama, infra,* and *Gardner v. Florida,* 430 U.S. 349 (1977).

Florida, 505 U.S. 1079 (1992).

On June 28, 2002, the United States Supreme Court remanded four cases in light of *Ring*: *Harrod v. Arizona*, 536 U.S. 953 (2002); *Pandeli v. Arizona*, 536 U.S. 953 (2002); *Sansing v. Arizona*, 536 U.S. 954 (2002); and *Allen v. United States*, 536 U.S. 953 (2002). None of those remands is surprising given that three are Arizona cases and the other is a Federal Court of Appeals decision based on *Walton v. Arizona, supra*. However, the Court **denied** certiorari in seven cases raising the "*Ring*" issue: *Brown v. Alabama*, 536 U.S. 964 (2002); *Mann v. Florida*, 536 U.S. 962 (2002); *King v. Florida*, 536 U.S. 962 (2002); *Bottoson v. Florida*, 536 U.S. 962 (2002); *Card v. Florida*, 536 U.S. 963 (2002); *Hertz v. Florida*, 536 U.S. 963 (2002); and *Looney v. Florida*, 536 U.S. 966 (2002). Obviously, if the Court had intended to apply *Ring* to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself. Further, and of even greater significance, the United States Supreme Court denied a stay of execution July 23, 2002, in an Oklahoma case which raised a *Ring* claim. *See, Cannon v. Oklahoma*, 536 U.S. 974 (2002). This Court should not accept Herring's invitation to "review" the decisions of the United States Supreme Court.

C. *RING* DOES NOT REQUIRE JURY SENTENCING, AND THIS COURT SHOULD NOT ACCEPT HERRING'S INVITATION TO EXTEND *RING*.

Herring's argument that *Ring* requires jury sentencing is incorrect -- that is an Eighth Amendment argument, not a Sixth Amendment one, which confuses the additional procedures the Florida legislature provided to avoid arbitrary jury sentencing (which is the Eighth Amendment component) with the death-eligibility determination, which is the Sixth Amendment component, and which is the focus of *Apprendi/Ring*. In upholding the constitutionality of Florida's death sentencing scheme, the United States Supreme Court said:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require

> it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Spaziano v. Florida, 468 U.S. 447, 464 (1984). *Apprendi/Ring* did not affect that pronouncement because it does not involve the jury's role in **imposing sentence** -- it only requires that the jury find the defendant death-eligible, which a Florida jury does at the guilt stage proceedings.

1. The death-eligibility determination is made at the guilt phase of a capital trial.

Florida law places the death-eligibility determination at the guilt phase of a capital trial -- that necessarily satisfies the *Ring* "death eligibility" component. The jury (under *Ring*) only has to make the determination of **death eligibility** -- the judge may make the remaining findings. *Ring* speaks only to the finding of death eligibility; not aggravators, mitigators, or the weighing of them. *Ring, supra ("*What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.") (Scalia, J., concurring). When this statement by Justice Scalia is read in the context of Arizona's capital sentencing law, "aggravating factor" means the same thing as "death-eligibility factor," because Arizona (unlike Florida) makes the "eligibility for death" determination, as well as the selection determination, at the penalty phase. The United States Supreme Court has repeatedly acknowledged that there is no single, constitutional, scheme that a state must employ in implementing the death penalty. *Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988); *Spaziano v. Florida,* 468 U.S. 447, 464 (1984); *Tuilaepa v. California,* 512 U.S. 967, 972 (1994).[18] *See also, Zant v. Stephens,*

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[18] California law places the eligibility determination at the guilt phase. *Tuilaepa, supra,* at 969 ("[T]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."); *People v. Ochoa,* 26 Cal. 4th 398, 453-54, 28 P.3d 78, 110 Cal.

462 U.S. 862, 874-78 (1983). The constitution is satisfied when a Florida defendant is **convicted** of an offense for which death is the maximum sentence exposure because the conviction determines the fact of "eligibility for death."

2. Florida law is different from Arizona's.

Ring did not eliminate the trial judge from the sentencing equation or in any fashion imply that Florida should do so. Under the Arizona capital sentencing statute, the "statutory maximum" for practical purposes is **life** until such time as a **judge** has found an aggravating circumstance to be present. An Arizona jury played no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. As the Arizona Supreme Court described Arizona law, the statutory maximum sentence permitted **by the jury's conviction alone** is life. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001).[19] Florida law is not like Arizona's. *Mills v. State,* 786 So. 2d 532 (Fla. 2001).

The distinction between a "sentencing factor" (*i.e.*: "selection factor," under Florida's statutory scheme) and an element is sharply made in *Apprendi,* where the Court stated: "One need only look to the kind, degree, or range of punishment to which the prosecution is entitled for a given set of facts. **Each fact necessary for that entitlement is an element.**" *Apprendi v. New Jersey,* 530 U.S. at 462. [emphasis added]. A Florida defendant is eligible for a death sentence on conviction for capital murder, and a death sentence, under Florida's scheme, is not a "sentence enhancement," nor is it an "element" of the underlying offense. *Almendarez-Torres v. United States,* 523 U.S. 224 (1998); *McMillan v. Pennsylvania,* 477 U.S. 79 (1986). *See, Hildwin*

Rptr. 2d 324 (2001) (rejecting *Apprendi*-claim).

[19] This Arizona statute is the one that the United States Supreme Court misinterpreted in *Walton*. *Ring, supra.* Because the United States Supreme Court's description of Arizona law was incorrect in *Walton* and *Apprendi*, Herring's efforts to argue that Florida law is "like the Arizona statute in *Walton*" are, at best, disingenuous because the Court was mistaken about the operation of Arizona law. Any comparison of the *Walton* statute to Florida is based upon a false premise.

v. Florida, 490 U.S. 638, 640-41 (1989). [emphasis added].[20] And, as Justice Scalia's concurrence emphasizes, ***Ring* is not about jury sentencing at all**:

> Those States that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of aggravating factor [in context, death-eligibility factor] in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."

Ring, supra. Florida's capital sentencing scheme comports with those constitutional requirements.

3. Florida provides additional Eighth Amendment protection at the sentencing phase.

The Florida capital sentencing statue provides for the jury's participation.[21] The statute secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death under both the Sixth and Eighth Amendments. *See, Spaziano v. Florida*, 468 U.S. at 464-5. Subsequently, the Court emphasized that a Florida jury's role is so vital to the sentencing process that the jury is a "co-sentencer." *Espinosa v. Florida*, 505 U.S. 1079 (1992). However, the *Espinosa* Court did not retreat from the premise of *Spaziano*:

> We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority.

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[20] "The Constitution permits the trial judge, acting alone, to impose a capital sentence." *Harris v. Alabama*, 513 U.S. 504, 515 (1995). Like Florida, Alabama law places the eligibility-for-death determination at the guilt phase. § 13A-5-40, *Ala. Stat.*

[21] Under the statute, the jury **must** find the existence of one or more aggravators **before** reaching the sub-section C recommendation stage. The penalty phase jury must conduct the sub-section A and B analysis before sub-section C comes into play.

> . . . We merely hold that, **if a weighing State decides to place capital sentencing authority in two actors rather than one**, neither actor must be permitted to weigh invalid aggravating circumstances.

Espinosa v. Florida, 505 U.S. at 1082. [emphasis added].

4. The aggravators need not be set out in the indictment, nor must the sentence stage (selection stage) jury unanimously recommend a sentence.

Herring's claims that a death sentence requires juror unanimity, the charging of the aggravators in the indictment, or special jury verdicts are unsupported by *Ring*. These issues are **expressly** not addressed in *Ring*, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider the Court's well-established rejection of these claims. *Sweet v. State*, 822 So. 2d 1269 (Fla. 2002) (prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from *Proffitt v. Florida*, 428 U.S. 242 (1976)); *Cox v. State*, 819 So. 2d 705, 724 at n. 17 (Fla. 2002) (same), *cert. denied*, 537 U.S. 1120 (2003).

Herring's argument that a unanimous jury recommendation is constitutionally required has been repeatedly rejected by this Court. *See, e.g., Looney v. State*, 803 So. 2d 656, 674 (Fla. 2001), *cert. denied*, 536 U.S. 966 (2002). *See, Way v. State*, 760 So. 2d 903, 924 (Fla. 2000), *cert. denied*, 531 U.S.1155 (2001) (Pariente, J., concurring)(noting that it is a statute that allows the jury to recommend the imposition of the death penalty based on a non-unanimous vote). And, even before *Apprendi*, this Court consistently held that a jury may recommend a death sentence on simple majority vote. *Thompson v. State*, 648 So. 2d 692, 698 (Fla. 1994) (reaffirming *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990)); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975)(advisory recommendation need not be unanimous). After *Apprendi*, the Court has consistently rejected claims that *Apprendi* requires a unanimous jury sentencing recommendation. *Card v. State*, 803 So. 2d 613, 628 & n.13 (Fla. 2001), *cert. denied*, 536 U.S. 963 (2002); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001), *cert. denied*, 536 U.S. 963 (2002); *Brown v.*

Moore, 800 So.2d 223 (Fla. 2001).

The United States Supreme Court has held that a finding of guilt does not need to be unanimous.[22] *Cf. Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Jurors do not have to agree on the particular aggravators; are not required to agree on the particular theory of liability, *Schad v. Arizona*, 501 U.S. 624, 631 (1991); and may not be required to unanimously find mitigation. *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988). *Ring* simply affirms the distinction between "sentencing factors" and "elements" of an offense which have long been recognized. *See Ring* at 597 n.4.; *Harris v. United States*, 536 U.S. 545 (2002). And, to the extent that Herring claims that *Ring* requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of Federal cases (with their wholly different procedural requirements) to Florida's capital sentencing scheme.[23]

Ring's Sixth Amendment jurisprudence is satisfied by the conviction in Florida and by this Court's pronouncement that death is the maximum sentence available under Florida law for the offense of capital murder. These matters do not change the Eighth Amendment requirement of channeling of the jury's discretion, which is done, and must still be done under Florida law, at the penalty phase of a capital trial.[24] Florida law over-meets the requirements of the Eighth

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[22] *See also, People v. Fairbank*, 16 Cal.4th 1223, 1255, 947 P.2d 1321, 69 Cal. Rptr.2d 784 (1997) (unanimity not required as to existence of aggravators, weight given to them, or appropriateness of a sentence of death).

[23] Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. *Ring v. Arizona, supra,* at n.4, *citing, Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000); *Hurtado v. California,* 110 U.S. 516 (1884) (holding that, in capital cases, the States are not required to obtain a grand jury indictment). This distinction, standing alone, is dispositive of the indictment claim.

[24] The most that can be said for the votes against a death sentence are that they amount to what can be called a "jury pardon". *Dougan v. State*, 595 So. 2d 1, 4 (Fla. 1992). The jury's vote reflects considered weighing of the aggravating and mitigating circumstances, not whether any particular juror rejected some or all of the

Amendment, and satisfies the Sixth Amendment, as well. *See Pulley v. Harris, supra.*

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. And, as Justice Scalia commented, "those States that leave the ultimate life-or-death decision to the judge **may continue to do so**." *Ring, supra.*

The United States Supreme Court's holding in *Clemons v. Mississippi* is dispositive:

> **Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.**

Clemons v. Mississippi, 494 U.S. 738, 745-6 (1990).[25]

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aggravating circumstances. The only conclusion that can be drawn from the jury's sentencing vote is that those jurors thought that life was a more appropriate sentence.

[25]To the extent that Herring claims that an "uncharged aggravator" was relied on by the trial judge, that claim is procedurally barred and unworthy of further discussion. To the extent that Herring challenges various jury instructions, that claim is time barred and, likewise, deserves no further comment. Finally, the argument that *Ring* means that the "striking of the cold, calculated and premeditated aggravator" requires reversal is spurious. That claim is likewise untimely, because it could have been raised long ago. *Ring* created no new "right", nor did it alter the holding in *Clemons,* which clearly permits the procedure followed by this Court in this case.

CONCLUSION

Based upon the arguments and authorities set out herein, the Respondent respectfully requests that this Court deny the *Apprendi/Ring* claim on procedural bar grounds, and, in the alternative, for lack of merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Jon M. Wilson,** Foley & Lardner, 111 N. Orange Ave., Post Office Box 2193, Orlando, Florida 32802-2193, **Sherman & Sterling,** LLP, 599 Lexington Ave., New York, New York 10022, **Gurney & Handley, PA,** 225 East Robinson St., Suite 450, Orlando, Florida 32807, Attorneys for Petitioner Ted Herring, on this ___ day of August, 2003.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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